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No. _____

In The

# Supreme Court of the United States

SOUTH FORK BAND OF THE TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS OF NEVADA; MARVIN MCDADE, in his capacity as Chairman of the South Fork Band Council,

*Petitioners,*

v.

SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT, AND THE HONORABLE RICHARD A. WAGNER, DISTRICT JUDGE,

*Respondents,*

and

STATE ENGINEER of the State of Nevada and WATER COMMISSIONERS of the Sixth Judicial District Court,

*Real Parties In Interest.*

**On Petition For Writ Of Certiorari To The Nevada Supreme Court**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

(1) Where Nevada state water rights are adjudicated to non-Indians and the lands to which the water rights are appurtenant are subsequently purchased by the United States and placed in trust for the South Fork Band of the Te-Moak Tribe of Western Shoshone Indians as a reservation, does the acquisition and use of those waters constitute a waiver of the Tribe's immunity from a suit to declare a water commissioner's right to cross the Reservation to administer the water rights of other parties?

(2) Is the United States an indispensable party to litigation involving the question of whether or not a right of way exists on lands it holds in trust for the South Fork Band of the Te-Moak Tribe?

(3) Where lands and appurtenant water rights are subject to a state water decree while in the hands of private parties are purchased by the United States and placed in trust as a Reservation for the Tribe, does the State of Nevada have an implied right of way across Reservation land to administer the water rights of other parties?

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## PETITION FOR WRIT OF CERTIORARI TO THE NEVADA SUPREME COURT

**TO THE SUPREME COURT:**

Petitioners, South Fork Band of the Te-Moak Tribe of Western Shoshone Indians of Nevada and Marvin McDade, in his capacity as Chairman of the South Fork Band Council (collectively the "Tribe"), respectfully petition this Court for a writ of certiorari to the Supreme Court of the State of Nevada.

## OPINION BELOW

The Opinion of the Supreme Court of the State of Nevada, review of which is sought by this petition is reproduced in an appendix hereto ("App.") at A-1 to A-10.

## JURISDICTION

The opinion of the Supreme Court of the State of Nevada was entered on August 24, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

## STATEMENT OF CASE

The decision of the Supreme Court of the State of Nevada holds, for the first time, that an Indian Tribe, by virtue of acquiring equitable title to water, has waived its federal common law immunity from a suit to compel it to

allow state access across the Reservation to administer the water rights of a third party, that the United States is not an indispensable party to such a suit, and that state law applies to grant an easement across Reservation lands. The following facts underlie the decision.

### A. The South Fork Band of the Te-Moak Tribe of Western Shoshone Indians.

The United States of America and the Western Shoshone Indians entered into treaty in 1863[1]. This treaty was entered into prior to the State of Nevada achieving statehood in 1864[2]. The treaty provided for the establishment of reservations within the territory of Nevada at some future date[3].

Subsequently, the United States set about purchasing private ranches for the purpose of creating a land base for a reservation for the South Fork Band of the Te-Moak

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[1] Treaty with the Western Shoshoni, 1863. Oct. 1, 1863. 18 Stats., 689. Ratified June 26, 1866. Proclaimed Oct. 21, 1869. App. at B-1 to B-5.

[2] 13 United States Statutes at Large (1864), pp. 30-32.

[3] Article 6. The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which, they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.

Tribe of Western Shoshone Indians[4]. Each of the deeds provide that the purchase of land includes all water rights associated with the land. Nowhere in the deeds is there a provision establishing jurisdiction in any court. Nowhere in any of the deeds is there an express easement across these lands granted to anyone. While in private hands, the water rights had been adjudicated in a State proceeding which led to the entry of the "Humboldt Decree." Ultimately, the Tribe's reservation was created by Proclamation on February 8, 1941.

Today, the federally recognized Tribe's[5] reservation consists of approximately 15,680.38 acres of land located approximately 30 miles south of Elko, Nevada held in trust by the United States. A Court of Indian Offenses established by federal regulation[6] for the Te-Moak Tribes exists and is the primary entity used to resolve legal conflicts for the Tribe.

There are no State roads on the tribe's reservation. There are no federal rights of way across the reservation. There exists only one main paved tribally maintained road which intersects State Route 228 which goes to Lee, Nevada. In 1990, there were 268 enrolled Tribal members of which 101 resided on the reservation. In November 1999 a state water commissioner sought to cross the Reservation for purposes of accessing off-Reservation stream diversions, the Tribe ejected the water commissioner from

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[4] The United States purchased 5,862.28 acres on May 29, 1937, 2,195.63 acres on March 31, 1938, 1,514.96 on November 14, 1938, May 24, 1932, and May 16, 1934. App. C-1 to C-21.

[5] 65 Fed. Reg. 13301 (3/13/00).

[6] 25 C.F.R. 11.100(a)(4).

the Reservation. The Nevada State Engineer then commenced a contempt proceeding in the Nevada State District Court.

### B. Proceedings Below

This application for a writ arises from a proceeding initiated on November 5, 1999, in the Sixth Judicial District Court, Humboldt County, State of Nevada entitled *State Engineer, et al. v. South Fork Band of Te-Moak Tribe of Western Shoshone Indians of Nevada*, Case No. 2804-3. That Petition alleged that the Tribe and its chairman should be held in contempt for excluding the State Water Commissioner from the Tribe's Reservation when he attempted to cross the Reservation to reach private lands.[7] On January

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[7] This matter is just part of complex litigation between the State Engineer and the South Fork Band. The litigation began with a Petition for an Order to Show Cause and Order to Show Cause in August 1998 filed in state court against the Tribe. This litigation was subsequently removed to the United States District Court by the United States of America after it was joined as a party. The State Engineer's motion for remand was denied. The State Engineer moved in federal court for a Preliminary Injunction and the Tribe was enjoined from barring the State Engineer or its agents from accessing water diversions within the Tribe's Reservation. However, the United States District Court specifically denied a request to enjoin the Tribe from barring access across the Reservation. The Water Commissioner then sought access from the Tribe for that purpose but access was denied. That exclusion led to the challenged Petition for an Order to Show Cause being filed in the Sixth Judicial District Court of the State of Nevada. The Tribe moved, in the removed federal court action for an injunction barring the newly filed state court proceeding. The Tribe's motion was denied as being a proceeding separate and

12, 2000, the parties were advised by the Sixth Judicial District Court that a hearing would be held on January 26, 2000. On January 21, 2000, the Tribe served and filed a Motion to Dismiss the Petition for Order to Show Cause based on that court's lack of subject matter jurisdiction. On January 26, 2000, the hearing took place before the Honorable Richard A. Wagner. The Motion to Dismiss was denied from the bench. On February 2, 2000, the Honorable Richard A. Wagner issued his order denying the Tribe's Motion to Dismiss in Case No. 2804-3 holding that the Tribe has waived its immunity from suit in state court, that state law applied on the Tribe's Reservation and that the United States is not an indispensable party. The court then scheduled a hearing to take place on February 28, 2000, to show cause why the Tribe should not be held in contempt.

The Tribe filed an emergency petition for writ of prohibition with the Supreme Court of the State of Nevada on February 4, 2000. A stay was issued pending resolution of the Writ of Prohibition. On June 14, 2000, oral argument was had before the Supreme Court of the State of Nevada and a decision was rendered denying the petition for writ of prohibition by order of the Supreme Court of the State of Nevada on August 24, 2000.

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apart from the removed federal court action. Ultimately, the United States District Court remanded that case to the state court and both the Tribe and the United States have appealed that determination to the Ninth Circuit Court of Appeals.

## REASONS FOR GRANTING THE PETITION

The decision for which review is sought presents to this Court several important issues of first impression. This case presents the important question of whether or not the purchase of private lands by the United States with appurtenant state water rights, all of which are then placed in trust as a Reservation for the Tribe, waives the Tribe's sovereign immunity from state court jurisdiction in an action seeking access across the Reservation to administer the water rights of non-Indians residing off the reservation. The Nevada Supreme Court's decision finding jurisdiction in these circumstances is inconsistent with this Court's precedent concerning waiver of sovereign immunity. Even if the Tribe may be joined in such a suit, the decision presents to this Court the question of whether or not the United States is an indispensable party to litigation that essentially establishes an easement across lands that are held in trust for an Indian Tribe. Finally, the case presents the issue of whether the fact that the land was once subject to state jurisdiction while in private hands means that the State of Nevada has a right of way over such lands once they are part of a Reservation held in trust by the United States.

### I. THE NEVADA SUPREME COURT ERRONEOUSLY IMPLIED A WAIVER OF THE TRIBE'S IMMUNITY FROM SUIT.

The Nevada Supreme Court has essentially implied a waiver of tribal sovereign immunity, not from an express writing by the Tribe to that effect, but rather from the acts

of the United States in purchasing lands with appurtenant state water rights, which subsequently formed the Tribe's reservation, and from the Tribe's subsequent use of the water.

> We conclude that the purchase of the reservation land subject to previously adjudicated water rights constituted an express waiver of sovereign immunity, and that the Tribe's actions in benefitting from the abiding by the Humboldt Decree for more that [sic] five decades served to ratify this waiver.

(App. A-7)

An implied waiver is the most that court could find since neither the United States nor the Tribe has ever passed any law or executed any document relevant to this case evincing an express waiver of tribal sovereignty. All deeds of conveyance and other congressional and executive branch documents relevant to this land and water transaction are silent on the subject of tribal sovereign immunity. The law of this Court is that immunity waivers cannot be implied in such a backhanded fashion.

In *Kiowa Tribe of Oklahoma v. Manufacture and Technologies, Inc*, 523 U.S. 751, 140 L.Ed. 2d 981, 118 S.Ct. 1700 (1998), this Court reversed a state court's ruling that an Indian Tribe's sovereign immunity was waived when it entered into contracts off the reservation.

> As a matter of federal law an Indian Tribe is subject to suit only where Congress authorizes suit or the Tribe has waived its immunity.

523 U.S. 751, 755.

This Court also ruled that,

> . . . tribal immunity is a matter of federal law and is not subject to diminution by the states. *Three Affiliated Tribes, supra,* at 891; *Washington v. Confederated Tribes of Colville Reservation,* 447 U.S. 134, 154, 65 L.Ed. 2d 10, 100 S.Ct. 2069 (1980).

523 U.S. 751, 756.

This Court ruled that only Congress or the Tribe itself can waive the Tribe immunity from suit.[8] The State Supreme Court erroneously relies on the fact that water rights were previously adjudicated. But that did not happen in a general stream adjudication to which either the immunity of the United States or the Tribe was waived. Indeed, the McCarran Amendment, 43 U.S.C. § 666[9] had not even been passed by the time of the adjudication. This Court ruled in *Arizona v. San Carlos Apache Tribe,* 463 U.S. 545, 567 fn. 17, 77 L.Ed. 2d 837, 103 S.Ct. 3201 (1983) that the McCarran Amendment did not waive an Indian Tribe's sovereign immunity from suit as a party to such a proceeding.

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[8] This Court also noted that Congress had, in the past, enacted several laws which limited an Indian Tribe's liability from suit. 25 U.S.C. § 450f(c)(3), 25 U.S.C. § 2701(d)(7)(A)(ii).

[9] It is not clear whether or not Congress has waived the United States' immunity from suit in a subsequent enforcement action. Nor is it clear whether or not the United States' immunity from suit is waived in an enforcement action if the original adjudication of the water rights in question occurred prior to the passage of the McCarran Amendment, *see, Mannat v. United States,* 951 F.Supp. 172 (E.D. Cal. 1996).

Consequently, there is no specific congressional abrogation of the Tribe's immunity from suit. The only expression of Congressional waivers of immunity addressing water rights adjudications has been found by this Court not to apply to a Tribe. Given that Congress has not waived the Tribe's immunity, the only other way the Tribe's immunity could be deemed to be waived is if the Tribe itself expressly waives it.[10] In this case, the Supreme Court of the State of Nevada implied a waiver based on actions of the United States of America and by the Tribe. Nowhere, has the Tribe clearly and unequivocally stated in writing its consent to be sued. Moreover, the Tribe has taken no other affirmative action that some courts have held to amount to an express waiver. For example, the

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[10] Several circuit courts have identified circumstances in which Tribes could themselves waive their immunity from suit. *See, McClendon v. United States*, 885 F.2d 627, 630-631 (9th Cir. 1989) (A Tribe may waive its immunity by written language in a stipulated dismissal, settlement documents or in a lease but not necessarily by initiating litigation.), *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982) (A Tribe may waive its immunity by enacting an ordinance consenting to suit in a particular court.), *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981) (A Tribe may waive its immunity by voluntarily intervening in litigation and by written language in a settlement agreement agreeing to submit future controversies to a federal court.); *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986) (A Tribe may waive its immunity by voluntarily intervening as a party defendant.); *Maryland Casualty Co. v. Citizens National Bank of West Hollywood*, 361 F.2d 517 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966) (A Tribe may waive its immunity by written language in a corporate charter but only if it is clear.); *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143 (8th Cir. 1970) (A Tribe may waive its immunity by written language in a corporate charter).

Tribe has neither, intervened as a party in litigation, nor agreed in writing to submit disputes to a particular court, enacted on ordinance waiving its immunity or agreed to arbitrate disputes in a particular forum.

In holding that there was a waiver of sovereign immunity in the facts of this case, the Nevada Supreme Court contravened the clear directives of this Court.

## II. THE UNITED STATES IS AN INDISPENSABLE PARTY TO LITIGATION INVOLVING ACCESS ACROSS LAND IT HOLDS IN TRUST FOR AN INDIAN TRIBE.

The proceeding brought in state court essentially claims that the State has a right of way based on the Humboldt Decree across the Tribe's reservation. Otherwise the Tribe would be free to exercise its right to exclude others from the reservation and could not be held in contempt for so doing. The Tribe can only be held in contempt if the asserted right of way is valid. The United States is the title owner of the land on which the Petitioners' reservation sits and it holds the land in trust. As trustee of the land, the United States has an interest in the outcome of litigation that asserts a right of way across that land. As was held by the Eighth Circuit in *Fredericks v. Mandel*, 650 F.2d 144, 145 (8th Cir. 1981), "A proceeding against property in which the United States has an interest is a suit against the United States."

In *Mannat v. United States*, 951 F. Supp. 172 (E.D. Cal. 1996), a private party sought administration of water rights decree against the United States as trustee of an Indian Reservation. The court ruled that,

> The United States is an indispensable party to this claim. As discussed above, the inability to join the United states as an indispensable party must result in dismissal. *Imperial Granite Co. v. Puyallup Band of Indians*, 940 F.2d 1269, 1271 n.4 (9th Cir. 1991), citing *Carlson v. Tulalip Tribes*, 510 F.2d 1337, 1339 (9th Cir. 1975).

The Eighth Circuit in *Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir. 1987), held the United States to be an indispensable party when its interest would be affected by the outcome of litigation and then dismissed the proceeding.

The proceedings in state court did not join the United States as a party. The Tribe moved to dismiss on the grounds that an indispensable party was not joined. In denying the petition for writ of prohibition, the Supreme Court of Nevada ruled,

> Finally, petitioner's contention that the district court lacks jurisdiction over the contempt proceeding because the United States is an indispensable party and has not been joined is without merit. The actions giving rise to the contempt proceedings are those of petitioners, not the United States. Petitioners, not the United States created and adopted the resolutions that frustrated and interfered with the water commissioners' efforts to regulate the Humboldt River. Although the United States, as trustee, is the legal owner of the property and accompanying water rights, *see* Appropriations Act for the Department of the Interior, Pub. L. No. 68-580, 43 Stat. 1141, 1149 (1925); proclaiming certain lands in Nevada to be an Indian reservation, 6 Fed. Reg. 1203 (1941), the interest of the United States will not be affected by the contempt proceedings. Consequently, we conclude that the

district court does have jurisdiction because the United States has not been joined as a party to the contempt proceedings.

The interest of the United States in protecting Tribal lands from unauthorized rights of way is codified at 25 U.S.C. § 324[11] which provides that no right of way across Indian lands, "shall be made without the consent of the proper Tribal officials" and that no right of way is valid, "without the prior written consent of the Tribe". To the extent that the Supreme Court of the State of Nevada has determined that it was the purchase of the private lands by the United States that granted such a right of way over the Tribe's reservation, the United States is an indispensable party in determining whether or not such a right of way is valid. In addition, since the United States holds the water rights in trust, it is an indispensable party to an action affecting those rights.

## III. THE SUPREME COURT OF NEVADA'S DECISION THAT A RIGHT OF WAY ACROSS TRIBAL LANDS MAY BE IMPLIED CONFLICTS WITH DECISIONS OF THIS COURT.

A fundamental principle of federal Indian law is that a right of way over land held in trust by the United States cannot be gained by implication, *United States v. Clarke*, 445 U.S. 253, 63 L.Ed. 2d 373, 100 S.Ct. 1122 (1980). The Nevada Supreme Court has essentially implied a right of

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[11] 25 U.S.C. § 323 authorizes the Secretary of the Interior to grant rights of way over Indian lands. However, 25 C.F.R. 169.3 provides that no right of way be granted over Indian lands without the consent of the Tribe.

way based on the United States' purchase of the land with the appurtenant water rights attached and the Tribe's acquiescence to state personnel's accessing the reservation. In this case, the Tribe has never expressly consented to a right of way over its lands. At best the Tribe's acquiescence over the past years is a license which can be revoked.

Prior to the creation of the Tribe's reservation, there existed no authority for state water enforcement personnel to cross the property of one land holder to reach the property of another for the purposes of water rights administration[12]. The Humboldt Decree itself is silent on

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[12] Indeed, it was not until 1951 (1951 Statutes of Nevada 132, 135), ten years after the creation of the Tribe's reservation that the Nevada State Legislature amended NRS 533.305, by adding subsection 3, which provided,

> Whenever, in pursuance of his duties, the water commissioner regulates a head gate to a ditch of the controlling works of reservoirs, he shall attach such head gate or controlling works a written notice properly dated and signed, setting forth the fact that such head gate or controlling works has been properly regulated and is wholly under his control. Such notice shall be a legal notice to all parties interested in the diversion and distribution of the water of such ditch or reservoir. **Such water commissioner shall have the right of ingress and egress across and upon a public, private or corporate lands at all times in the exercise of his duties.** (Emphasis added).

The terms "public, private or corporate lands" are not defined in NRS 533.305. However, they are defined in several other Nevada statutes such as NRS 321.5963, NRS 321.655 and NRS 408.078. In each of these statutes, lands held in trust for Indian purposes or are Indian reservations are excluded from the

this point[13]. Additionally, the deeds of the property purchased by the United States say nothing about right of way across those lands.

In reaching its conclusion that the Tribe has waived its sovereign immunity, the Nevada Supreme Court relies heavily upon the Tribe's abiding by the Humboldt Decree, using the water and allowing the water commissioner to travel across the reservation for over 50 years. What this conclusion ignores is the principle that rights of way across Indian land cannot be inferred and the allowance of a Tribe of an activity over a period of time does not constitute the granting of a right of way.

The Ninth Circuit Court of Appeals addressed a similar issue in *United States of America v. Southern Pacific Transportation Company*, 543 F.2d 676 (9th Cir. 1976). In that case, the Ninth Circuit reversed the lower court's determination that the construction of a railroad across a tribe's reservation, the failure of the Indians to object for over 90 years and the acceptance of consideration amounted to an implied license for a right of way over

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definition of public lands. Arguably the Nevada statutory authority for crossing the Tribe's reservation is by its own terms inapplicable.

In essence, the state has rendered itself a right of way over the Tribe's reservation either by implication prior to the creation of the reservation or by legislative enactment after the creation of the reservation. Neither passes muster under federal law.

[13] The ordering paragraphs of the Humboldt Decree, which consist of both the Bartlett (App. D-1 to D-9) and Edwards Decree (App. E-1 to E-2) say nothing about a right of way across any lands subject to the Humboldt Decree.

the tribal land. In reversing that decision, the Ninth Circuit relied by analogy upon this Court's holding in *Bunch v. Cole*, 263 U.S. 250, 68 L.Ed. 290, 44 S.Ct. 101 (1923) and *Smith v. McCullough*, 270 U.S. 456, 70 L.Ed. 682, 46 S.Ct. 338 (1926). The Ninth Circuit held that,

> A license may not be inferred as an implied-in-fact contract because of the failure of Southern Pacific to comply with 25 U.S.C. §§ 81 & 84, which govern contracts with Indian tribes.

543 F.2d 676, 697.

There as here, a right of way over Indian lands was sought to be established by implication based in part upon long standing Tribal acquiescence to a right of way even though that right of way was not properly acquired. In this case, a right of way across the Tribe's reservation has never been expressly consented by the Tribe. Accordingly, the Tribe's non-objection to the water commissioner's crossing its reservation for almost 50 years is at best a license which could be revoked at any time. Such a conclusion was deemed by the Ninth Circuit to be consistent with this Court's ruling in *Bunch, supra*, where this Court voided leases granted by Indians granted to non-Indians even after a significant period of time has passed because the leases were never valid in the first instance. As the Ninth Circuit ruled in *Southern Pacific, supra*,

> Although it may appear harsh to condemn an apparently good-faith use as a trespass after 90 years of acquiescence by the owners, we conclude that an even older policy of Indian law compels this result.

543 F.2d 676, 699.

The Nevada Supreme Court's decision is especially egregious because it denies even the most basic of tribal powers over their reservation – the power to exclude outsiders from entering. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 71 L.Ed. 2d 21, 102 S.Ct. 894 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333, 75 L.Ed. 2d 611, 103 S.Ct. 2378 (1983) ("A Tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is equally well established.").

The issues presented in this case are not unique to the South Fork Band. Two other Tribes in Nevada had their reservations created by the purchase of private lands with appurtenant water rights by the United States. The Duckwater Reservation was created by the purchases of two private ranches in 1940[14]. The Yomba Reservation was created by the purchase of two private ranches in 1937.[15] A large part of the Yerington Paiute Reservation was created by the purchase of private lands with appertunent decreed water rights.[16]

The decision of the Nevada Supreme Court cannot be allowed to stand.

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[14] Crum, Steven J., "The Road on Which We Came – Po'i pentum tammen kimmapeah; a history of the Western Shoshone" University of Utah Press, Salt Lake City (1994) p. 96.

[15] Crum, *supra*, p. 95 and American Indian Reservation Trust Areas, Veronica E. Velarde Tiller, Editor, US Department of Commerce (1996) p. 431.

[16] NUMA: Northern Paiute History, University of Utah Printing Service (1976), p. 59.

## CONCLUSION

This petition presents issues of first impression. The Supreme Court of the State of Nevada has boldly implied a waiver of the Tribe's sovereign immunity from acts of the United States and the Tribe. While this Court has repeatedly held that such a waiver cannot be implied, it has yet to rule in a case where a waiver has, in fact, been implied by a lower court.

The Supreme Court of the State of Nevada has also allowed litigation involving rights of way across trust land to proceed against a Tribe without joinder of the United States, the legal owner of the property.

Lastly, the Supreme Court of the State of Nevada has essentially implied a right of way over Indian trust lands in disregard of this Court's precedent.

Review by this Court is important because other Indian reservations in Nevada have been created by the purchase of private lands by the United States with appurtenant water rights. As such, similar issues may arise in the future. Moreover, as more and more Indian tribes purchase private lands to add to their land bases similar issues will arise.

For the reasons argued herein, it is respectfully requested that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

RAYMOND RODRIGUEZ, ESQ.
*Council for Petitioners*

## APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

| | |
|---|---|
| SOUTH FORK BAND OF THE TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS OF NEVADA; MARVIN MCDADE, IN HIS CAPACITY AS CHAIRMAN OF THE SOUTH FORK BAND COUNCIL,<br>Petitioners,<br>vs.<br>THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT, AND THE HONORABLE RICHARD A. WAGNER, DISTRICT JUDGE,<br>Respondents,<br>and<br>STATE ENGINEER OF THE STATE OF NEVADA AND WATER COMMISSIONERS OF THE SIXTH JUDICIAL DISTRICT COURT,<br>Real Parties in Interest. | No. 35591 |

(Filed Aug. 24, 2000)

Original petition for writ of prohibition seeking to prevent the district court from proceeding on a petition

for an order requiring petitioners to show cause why they should not be held in contempt for interfering with the state engineer and water commissioners in regulating adjudicated water rights along the Humboldt River.

Petition denied.

Nevada Legal Services and Raymond Rodriguez, Carson City, for Petitioners.

David G. Allison, District Attorney, Humboldt County, for Respondents.

Frankie Sue Del Papa, Attorney General, and Paul G. Taggart, Deputy Attorney General, Carson City, for Respondents and Real Parties in Interest.

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BEFORE THE COURT EN BANC.

OPINION

PER CURIAM:

This is an original petition for writ of prohibition seeking to prevent the district court from proceeding on a petition for an order requiring petitioners to show cause why they should not be held in contempt for interfering with the state engineer and water commissioners in regulating adjudicated water rights along the Humboldt River. Petitioners contend that the district court lacks jurisdiction based on sovereign immunity.

We conclude that petitioners waived sovereign immunity when the United States purchased, and petitioners took, the reservation land subject to previously adjudicated water rights. Petitioners ratified this waiver

by their historical compliance with the Humboldt Decree, including paying assessment fees and permitting the state engineer and water commissioners access to the reservation. Consequently, petitioners are subject to the jurisdiction of the Sixth Judicial District Court, and we therefore deny the petition for writ of prohibition.

In 1913, the state engineer initiated water rights adjudication procedures for the Humboldt River. See Ormsby County v. Kearney, 37 Nev. 314, 142 P. 803 (1914). The state engineer issued an order of determination for the Humboldt River in 1923. As part of the adjudication, the Sixth Judicial District Court decreed water rights to five ranches. In 1935, the Sixth Judicial District Court amended the decree, completing its adjudication of water rights for the Humboldt River. This decree became known as the Humboldt Decree, and thereafter, the state engineer and the water commissioners were responsible for distributing the water rights adjudicated under the Decree. Subsequently, between 1937 and 1942, the United States purchased the five ranches to form the South Fork Reservation for the Te-Moak Tribe of the Western Shoshone Indians (the tribe).

For approximately fifty-five years, the tribe cooperated with the state engineer and water commissioners, allowing them access onto the reservation. In particular, the tribe allowed the state engineer and water commissioners to enter the reservation and to traverse the reservation to reach private lands on which diversions that served the tribe's water rights, as well as other landowners' rights, were located. It appears from the documentation submitted to this court that the United States paid the assessment fees for a period of time in the 1970s

and early 1980s, and that the tribe paid the assessment fees from the mid-1980s until at least the early 1990s. However, on March 8, 1998, the tribe adopted two resolutions decreeing that water commissioners would not be allowed to enter the reservation and that the tribe would not pay assessment fees that were charged against every holder of water rights in the Humboldt River.

Subsequently, and at different times, the state engineer and water commissioners of the Sixth Judicial District Court filed three contempt proceedings in the Sixth Judicial District Court.[1] We are presently concerned with the third contempt proceeding, which is the subject of this petition. In that contempt proceeding, the state engineer sought an order from the district court directing petitioners to show cause why they should not be held in contempt for frustrating the water commissioners' enforcement of the Humboldt Decree, specifically regarding an incident that occurred on September 13, 1999.

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[1] The first contempt proceeding (Humboldt I) was filed against petitioners, but was subsequently amended to name the United States as a respondent. The United States filed a notice of removal, removing the proceeding to federal court. The federal court denied the state's motion to remand the case to state court. *See* State Engineer v. South Fork Band of Te-Moak Tribe, 66 F. Supp. 2d 1163 (D. Nev. 1999). The state engineer also filed a separate contempt proceeding (Humboldt II) in the Sixth Judicial District Court against the United States in an effort to compel the United States to pay the assessment fees. Again, the United States filed a notice of removal to federal court. The state engineer filed a motion to remand the proceedings to state court. At the time this petition for writ of prohibition was filed, the state engineer's motion to remand remained pending in federal court.

On September 13, 1999, Wayne Testolin, a supervising water commissioners [sic], and two other water commissioners entered the reservation to reach a private ranch adjacent to the reservation, known as the Gund Ranch, for the purpose of regulating the river pursuant to the Humboldt Decree. Some of the tribe's water rights are served by diversions located on the Gund Ranch. Consequently, to properly control the tribe's water rights, as well as water rights for other private landowners, the diversions located on the Gund Ranch must be adjusted.[2] When the water commissioners entered the reservation, they were followed by a tribal peace officer. The water commissioners traveled off the reservation and onto the Gund Ranch, where they were stopped by the tribal peace officer and Mr. Marvin McDade, chairman of the South Fork Band Council, and escorted back to the tribal office on the reservation. Mr. Testolin was handcuffed, charged with trespass and escorted off the reservation.

On November 9, 1999, the state engineer and water commissioners of the Sixth Judicial District Court petitioned the district court for an order to show cause why the tribe and Mr. McDade should not be held in contempt for interfering with the water commissioners' authority to regulate the Humboldt River. The tribe and Mr. McDade filed a motion to dismiss the petition, which the district court denied. The tribe and Mr. McDade then filed this petition for a writ of prohibition to prevent the district

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[2] The state engineer and water commissioners contend that they cross the reservation to reach the Gund Ranch because it provides the most reasonable access to the ranch.

court from proceeding with a contempt hearing, contending that the district court lacks jurisdiction over the tribe and Mr. McDade, in his official capacity, and that the United States is an indispensable party to the district court contempt proceedings.

Turning to the issue of the district court's jurisdiction over the tribe, "[i]t is well established that Indian tribes possess the same common-law immunity from suit traditionally enjoyed by sovereign powers." Val-U Constr. Co. v. Rosebud Sioux Tribe, 146 F.3d 573, 576 (8th Cir. 1998); *accord* Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991); Pan American Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 418 (9th Cir. 1989). However, sovereign immunity can be waived. *See* Puyallup Tribe v. Washington Game Dept., 433 U.S. 165 (1977). Such a waiver may not be implied, but must be expressed unequivocally. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978). A waiver does not require the invocation of "magic words" indicating that a tribe has waived its sovereign immunity. *See Val-U Constr. Co.*, 146 F.3d at 577.

Generally, without congressional authority, Indian tribes are exempt from suit. *See Santa Clara*, 436 U.S. at 58. However, some courts have concluded that a tribe, by its actions, may consent to suit without express congressional authority. For example, in United States v. Oregon, 657 F.2d 1009, 1013-16 (9th Cir. 1981), the court held that an Indian tribe may consent to suit without express congressional authority, and that a tribe's intervention in establishing its fishing rights constituted consent to the district court's jurisdiction to issue and modify an equitable decree that encompassed tribal rights. *See also*

McClendon v. United States, 885 F.2d 627, 629 n.1 (9th Cir. 1989) (stating that initiation of litigation by the United States in its capacity as tribal trustee could potentially result in a waiver of tribal immunity despite the fact that the tribe was not a party to the suit); Native Village of Eyak v. GC Contractors, 658 P.2d 756 (Alaska 1983) (determining that an Indian tribe waived its sovereign immunity from suit without obtaining congressional authority by entering into an agreement containing an arbitration clause).

In this case, the tribe is the successor-in-interest to owners of Humboldt Decree water rights and has enjoyed the benefits of the Decree. Until 1998, water commissioners entered the reservation without interference to regulate the Humboldt River to ensure that all users received their decreed water rights. For the past fifty-five years, the tribe allowed the water commissioners to travel on and across the reservation, and the tribe paid assessment fees pursuant to the Decree for some period of time between the mid-1980s and early 1990s. Finally, the deeds to the property the United States purchased for the tribe specifically mention the appurtenant water rights and/or the Humboldt Decree. We conclude that the purchase of the reservation land subject to previously adjudicated water rights constituted an express waiver of sovereign immunity, and that the Tribe's actions in benefiting from and abiding by the Humboldt Decree for more that [sic] five decades served to ratify this waiver. *See* State Engineer v. South Fork Band of Te-Moak Tribe, 66 F.Supp.2d at 1163, 1172 (D.Nev.1999) (stating that "[i]f there remain[s] any doubt as to the United States[']s express and unequivocal waiver in behalf of the Tribe, in its initial purchase of

the decreed rights, the Tribe's actions over the ensuing fifty years since the purchase of their decreed water rights clearly demonstrate a continuing ratification of its initial waiver of immunity").

We have recognized that the Sixth Judicial District Court has continuing jurisdiction over matters arising out of the administration of the Humboldt Decree. State Engineer v. Sustacha, 108 Nev. 223, 826 P.2d 959 (1992). The Sixth Judicial District Court has the authority to hold in contempt those who interfere with or frustrate the actions of the state engineer or water commissioners in the administration of the Humboldt Decree. State v. District Court, 52 Nev. 270, 286 P. 418 (1930).

The tribe enjoys sovereign immunity, and thus, generally, cannot be subjected to the jurisdiction of a state court. *See, e.g.*, Snooks v. District Court, 112 Nev. 798, 919 P.2d 1064 (1996) (holding that a Nevada state court had no jurisdiction to entertain a civil action filed by a non-Indian against an Indian for events that occurred on Indian land); Patterson v. Four Rent, Inc., 101 Nev. 651, 707 P.2d 1147 (1985) (holding that a Nevada state court had no jurisdiction over Indian claims to land allotments). However, here, as the purchase of the tribe's reservation land subject to the Humboldt Decree, constituted a waiver of sovereign immunity, the Sixth Judicial District Court is within its authority in exercising jurisdiction over the tribe concerning its alleged interference with the administration of water rights pursuant to the Decree. To hold that the tribe is not amenable to the jurisdiction of the Sixth Judicial District Court under these circumstances would frustrate the district court's

authority over matters arising out of the administration of the Decree.

Finally, petitioners' contention that the district court lacks jurisdiction over the contempt proceeding because the United States is an indispensable party and has not been joined is without merit. The actions giving rise to the contempt proceedings are those of petitioners, not the United States. Petitioners, not the United States, created and adopted the resolutions that frustrated and interfered with the water commissioners' efforts to regulate the Humboldt River. Although the United States, as trustee, is the legal owner of the property and accompanying water rights, *see* Appropriations Act for the Department of the Interior, Pub. L. No. 68-580, 43 Stat. 1141, 1149 (1925); Proclaiming Certain Lands in Nevada to be an Indian Reservation, 6 Fed. Reg. 1203 (1941), the interests of the United States will not be affected by the contempt proceedings. Consequently, we conclude that the district court does have jurisdiction because the United States has not been joined as a party to the contempt proceedings.

A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the jurisdiction of the district court. NRS 34.320; *see* Budget Rent-A-Car v. District Court, 108 Nev. 483, 835 P.2d 17 (1992). We have held that a writ of prohibition is an appropriate vehicle through which to challenge the district court's improper exercise of jurisdiction. *See* Indiana Ins. Co. v. District Court, 112 Nev. 949, 920 P.2d 514 (1996); Phelps v. District Court, 106 Nev. 917, 803 P.2d 1101 (1990).

Here, since petitioners waived their sovereign immunity, we conclude the Sixth Judicial District Court has jurisdiction over petitioners in the underlying contempt proceedings. Consequently, we are not satisfied that this court's intervention by way of extraordinary relief is warranted at this time. We therefore deny the petition.[3]

/s/ Rose, C.J.
Rose

/s/ Young, J.
Young

/s/ Maupin, J.
Maupin

/s/ Shearing, J.
Shearing

/s/ Agosti, J.
Agosti

/s/ Leavitt, J.
Leavitt

/s/ Becker, J.
Becker

**ATTEST: A FULL TRUE AND CORRECT COPY.**

CLERK OF THE SUPREME COURT
By /s/ A. Awarado
Deputy Clerk

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[3] We grant the real parties in interest's motion to file supplemental authority and direct the clerk of this court to file the supplemental authority appended to the motion. We have considered this supplemental authority in resolving the instant petition.

## APPENDIX B

INDIAN AFFAIRS: LAWS AND TREATIES. TREATY WITH THE WESTERN SHOSHONI, 1863.

TREATY WITH THE WESTERN SHOSHONI, 1863, Oct. 1, 1863. 18 Stats., 689. Ratified June 26, 1866. Proclaimed Oct. 21, 1869.

Indian Affairs: Laws and Treaties. Vol. II (Treaties). Compiled and edited by Charles J. Kappler.

Washington: Government Printing Office, 1904.

Peace established; depredations to cease. Routes of travel; offenders; safety of travelers. Military posts; stations. Telegraph and overland stage lines. Railway. Explorations, mines, settlements, use of timber. Boundaries of western bands of Shoshoni. Reservations may be established. Annuity, acceptance of, as compensation for loss of game. Presents acknowledged.

Treaty of Peace and Friendship made at Ruby Valley, in the Territory of Nevada, this first day of October A.D. one thousand eight hundred and sixty-three, between the United States of America, represented by the undersigned commissioners, and the Western Bands of the Shoshonee Nation of Indians, represented by their Chiefs and Principal Men and Warriors, as follows:

ARTICLE 1.

Peace and friendship shall be hereafter established and maintained between the Western Bands of the Shoshonee nation and the people and Government of the United States; and the said bands stipulate and agree that hostilities and all depredations upon the emigrant trains, the

mail and telegraph lines, and upon the citizens of the United States within their country, shall cease.

ARTICLE 2.

The several routes of travel through the Shoshonee country, now or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States, and all of emigrants and travellers under its authority and protection, without molestation or injury from them. And if depredations are at any time committed by bad men of their nation, the offenders shall be immediately taken and delivered up to the proper officers of the United States, to be punished as their offences shall deserve; and the safety of all travellers passing peaceably over either of said routes is hereby guarantied by said bands.

Military posts may be established by the President of the United States along said routes or elsewhere in their country; and station houses may be erected and occupied at such points as may be necessary for the comfort and convenience of travellers or for mail or telegraph companies.

ARTICLE 3.

The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through a part of the Shoshonee country, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said bands, and that their property and the

lives and property of passengers in the stages and of the employes of the respective companies, shall be protected by them. And further, it being understood that provision has been made by the government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by the said bands that the said railway or its branches may be located, constructed, and operated, and without molestation from them, through any portion of country claimed or occupied by them.

ARTICLE 4.

It is further agreed by the parties hereto, that the Shoshonee country may be explored and prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be required. Mills may be erected and timber taken for their use, as also for building and other purposes in any part of the country claimed by said bands.

ARTICLE 5.

It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:

On the north by Wong-goga-da Mountains and Shoshonee River Valley; on the west by Su-non-to-ya Mountains or Smith Creek Mountains; on the South by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley.

ARTICLE 6.

The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which, they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.

ARTICLE 7.

The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceding stipulations, and of their faithful observance by the said bands, the United States promise and agree to pay to the said bands of the Shoshonee nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen. And the said bands hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded.

ARTICLE 8.

The said bands hereby acknowledge that they have received from said commissioners provisions and clothing amounting to five thousand dollars as presents at the conclusion of this treaty.

Done at Ruby Valley the day and year above written.

James W. Nye.
James Duane Doty.
Te-moak, his x mark.
Mo-ho-a.
Kirk-weedgwa, his x mark.
To-nag, his x mark.
To-so-wee-so-op, his x mark.
Sow-er-e-gah, his x mark.
Po-on-go-sah, his x mark.
Par-a-woat-ze, his x mark.
Ga-ha-dier, his x mark.
Ko-ro-kout-ze, his x mark.
Pon-ge-mah, his x mark.
Buck, his x mark.
Witnesses:

J.B. Moore, lieutenant-colonel Third Infantry California Volunteers.
Jacob T. Lockhart, Indian agent Nevada Territory.
Henry Butterfield, interpreter.

## APPENDIX C

[Elko County Deed Book 49 Page 306]

*File No. 69208*

### HENDERSON BANKING COMPANY MORTGAGE CORPORATION TO UNITED STATES OF AMERICA

THIS INDENTURE, Made the 29th day of May, 1937, between HENDERSON BANKING COMPANY MORTGAGE CORPORATION, a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, with principal place of business in the City of Elko, County of Elko, State of Nevada, the party of the first part, and THE UNITED STATES OF AMERICA in trust for such Indians of the TeMoak Bands of Western Shoshones resident in Nevada as shall be designated by the Secretary of the Interior in accordance with Section 19 of the Indian Reorganization Act, the party of the second part,

**WITNESSETH:**

That the said party of the first part, in consideration of the sum of FORTY THOUSAND and no/100 ($40,000.00) DOLLARS, lawful money of the United States of America to it in hand paid, by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, margin and sell, unto the said party of the second part, and to its successors and assigns forever, all those certain lots, pieces and parcels of land, situate, lying and being in the County of Elko, State of Nevada, and being bounded and more particularly described as follows, to-wit:

* * *

Land Description Omitted

* * *

TOGETHER with the tenements, hereditaments and appurtenances thereunto belonging, or appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO SAVE AND TO HOLD, the said premises, together with the appurtenances, unto the said party of the second part, and to its successors and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto caused its corporate name to be hereunto subscribed, and its corporate seal to be hereunto affixed, attested the day and year in this instrument first above written.

HENDERSON BANKING COMPANY
MORTGAGE CORPORATION
By W. M. WEATHERS PRESIDENT.

CORPORATE SEAL

ATTEST:

L. P. HARRIMAN
SECRETARY.
$40.00 Int. Rev. stamps attached
and cancelled L.P.H. 5/29/37

STATE OF NEVADA, )
) ss.
COUNTY OF ELKO. )

On this 3rd day of June, 1937, personally appeared before me, a Notary Public in and for said County and State, W.M. WEATHERS and L. P. HARRIMAN, known to me to be the President and Secretary respectively of the corporation that executed the foregoing instrument, and upon oath did depose that they are the officers of said corporation as above designated; that they are acquainted with the seal of said corporation and that the seal affixed to said instrument is the corporate seal of said corporation; that the signatures to said instrument were made by officers of said corporation as indicated after said signatures; and that the said corporation executed the said instrument freely and voluntarily and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

PEGGY O'NEILL
Notary Public. –

[SEAL]

MY COMMISSION EXPIRES:

June 17th, 1938.

WHEREAS, at the regular meeting of this Board of Directors, at which a full Board was present, held on the 6th day of November, 1936, the Board authorized the sale of the so-called A. M. Griswold Ranch to the United States Indian Service, for the sum of $40,000.00 and authorized an option to be executed therefor, providing said option should be amended to allow the use of growing crops and hay, and the full use of the property until such time as the full payment was received, and that use

of the property would be retained to such an extent so as to dispose of the last crop of hay on said premises, at the time of payment; and

WHEREAS, said option was executed; and

WHEREAS, on April 21, 1937, the Department of Interior exercised said Option and

WHEREAS, it is now necessary for this Corporation to execute a Deed as hereafter after stated,

NOW, THEREFORE, BE IT RESOLVED, that this Corporation sell to the United States of America, in Trust for such Indians of the TeMoak Bands of Western Shoshonse, resident in Nevada, as shall be designated by the Secretary of the Interior in accordance with Section 19 of the Indian Reorganization Act, the so-called A. M. Griswold Ranch, hereinafter described, for the sum of $40,000.00 and

BE IT FURTHER RESOLVED, that W. M. WEATHERS, President and L. P. HARRIMAN, Secretary, be and they are hereby authorized, empowered and directed to execute a deed to the Grantee as above mentioned, for and on behalf of this Corporation, conveying title in and to the following described lands:

* * *

Land Description Omitted

* * *

I, L. P. HARRIMAN, the duly elected, qualified and acting Secretary of Henderson Banking Company Mortgage Corporation, do hereby certify under the seal of said corporation, that the foregoing is a true and correct copy

of a resolution regularly presented and adopted by the Board of Director's of Henderson Banking Company Mortgage Corporation, at a regular Directors' meeting duly called and held at the Directors' Room in the Henderson Bank Building, Elko, Nevada, on the 1st day of June, 1937, at which meeting a quorum was present and voted.

L.P. HARRIMAN
Secretary

CORPORATE SEAL

Filed for record at request of Milton J. Reinhart on the 21 day of Oct. 1938 at 10:00 o'clock A.M.

J. Leslie Carter
County Recorder
By H. B. Wright
Deputy

[Elko County Deed Book 49 Page 72]

*FILE NO. 66742*

CLARK E. DROWN TO UNITED STATES OF AMERICA IN TRUST FOR INDIANS

THIS INDENTURE, made the 31st day of March A. D. 1938, by and between CLARK E. DROWN, also known as and called C. E. DROWN, a widower, of the County of Elko, State of Nevada, the party of the first part, and THE UNITED STATES OF AMERICA IN TRUST FOR SUCH INDIANS OF THE TENOAK BANDS OF WESTERN SHOSHONES RESIDENT IN NEVADA AS SHALL BE DESIGNATED BY THE SECRETARY OF THE INTERIOR IN ACCORDANCE WITH SECTION 19 OF THE INDIAN REORGANIZATION ACT, the party of the second part,–

WITNESSETH:

That the said party of the first part, for and is consideration of the sum of FORTH THREE THOUSAND EIGHT HUNDRED SEVENTY and no/100 DOLLARS ($43,870.00), current lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to its successors and assigns forever, the following lots, pieces and parcels of land situate, lying and being in the County of Elko, State of Nevada, and particularly described as follows, to-wit:–

* * *

Land Description Omitted

* * *

Including all water, water rights, dams and ditches now or heretofore used upon or in connection with the above-described property, and all range and range rights now and heretofore had and used in connection with said described premises and property.

Excepting therefrom all that certain lot, piece or parcel of land situate, lying and being in the southerly portion of NW¼ of SW¼ of Section 17, T. 31 N., R. 57 E., M. D. B. & M., particularly described as follows: Beginning at a point on mound of rock accepted as being the quarter corner between Sections 17 and 18, said Township and Range, running thence S.15.61 chs. to a point at a fence which point is hereby designated and referred to as Point No. 1, thence S. 82°15' E. 15 chs. along said fence to a point; thence S. 71° 15' E. 7.7 chs. along fence to intersection with south boundary of N½ of SW¼ of said Sec. 17; thence W. 22.12 chs. along said boundary to a point; thence at right angles to said last named course 4-45 chs. to fence Point No. 1, heretofore referred to.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD all and singular the said premises, together with the appurtenances, unto the said

party of the second part and to its successors and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand the day and year first above written.

$44.00 Int. Rev. stamps attached
and cancelled 3-31-38 H.U.C.

CLARK E. DROWN
Also known as and called:-
C.E. DROWN

STATE OF NEVADA, )
) SS.
COUNTY OF ELKO. )

On this 31st day of March, A. D. 1938, personally appeared before me, a Notary Public in and for the County of Elko, State of Nevada, - CLARK E. DROWN, also known as and called C. E. DROWN, a widower, - known to me to be the person described in and who executed the above and foregoing instrument; who acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the said County and State, the day and year in this certificate first above written.

H. U. CASTLE
- Notary Public -

My commission expires January 20, 1939.

[SEAL]

Filed for record at request of Eugene Drown on the 31st day of March 1938 at 11:15 o'clock A.M.

J. Leslie Carter
County Recorder

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[Elko County Deed Book 49 Page 428]

*FILE NO. 70022*

P. J. OGILVIE, ET UX TO THE UNITED STATES OF AMERICA

THIS INDENTURE, Made the 14th day of November, 1938, between P. J. OGILVIE and ANNIE M. OGILVIE, his wife, of the County of Elko, State of Nevada, the parties of the first part, and THE UNITED STATES OF AMERICA in trust for such Indians of the Te-noak Bands of Western Shoshones resident in Nevada, as shall be designated by the Secretary of the Interior in accordance with Section 19 of the Indian Reorganization Act, the party of the second part,

WITNESSETH:

That the said parties of the first part, in consideration of the sum of FIFTY THOUSAND and no/100 ($50,000.00) DOLLARS, lawful money of the United States of America, to them in hand paid, by the said party of the second part, the receipt where is hereby acknowledged, do by these presents grant, bargain and sell, unto the said party of the second part, and to its successors and assigns forever, all those certain lots, pieces and parcels of land, situate, lying and being in the County of Elko, State of Nevada, and being bounded and more particularly described as follows, to-wit:

* * *

Land Description Omitted

* * *

TOGETHER with all range, ranges and range watering rights of every name, nature,

kind and description used in connection with the above described premises.

TOGETHER with the tenements, hereditaments and appurtenances thereunto belonging, or appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, the said premises, together with the appurtenances, unto the said party of the second part, and to its successors and assigns forever.

IN WITNESS WHEREOF, said parties of the first part have hereunto set their hands the day and year first above written.

$50.00 Int. Rev. Stamps attached and cancelled P.J.O. 11/14/38

P.J. OGILVIE

ANNIE N. OGILVIE

STATE OF NEVADA, )
) ss.
COUNTY OF ELKO, )

On this 21st day of November, 1938, personally appeared before me, a Notary Public in and for said County and State, P. J. OGILVIE and ANNIE W. OGILVIE, his wife, known to me to be the persons described in and who executed the foregoing instrument; who acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official seal the day and year in this Certificate first above written.

[SEAL]

PEGGY O'NEILL
Notary Public

My commission expires:
June 17, 1942

Filed for record at request of Milton J. Reinhart on the 5 day of April 1939 at 10:00 o'clock a.m.

Gertrude M. Williams
County Recorder

[Elko County Deed Book 46 Page 366]

FILE NO. 52151. –

A.M. GRISWOLD ET UX TO HENDERSON BANKING COMPANY

THIS INDENTURE, Made the 24th day of May, one thousand nine hundred and thirty-two.

BETWEEN A.M. GRISWOLD and NEVADA E. GRISWOLD, his wife, of the County of Elko, State of Nevada, the parties of the first part, and HENDERSON BANKING COMPANY, a Nevada Banking Corporation, the party of the second part,

WITNESSETH: That the said parties of the first part, in consideration of the sum of TEN and no/100 Dollars lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents, grant, bargain and sell, unto the said party of the second part, and to its successors and assigns, forever: All those certain lots, pieces and parcels of land, situate, lying and being in the County of Elko, State of Nevada, and being more particularly bounded and described as follows, to-wit:

* * *

Land Description Omitted

* * *

Containing app. imately 5840 acres, more or less.

Together with all water, water rights, dams and ditches now or hereto used upon or in connection with the above described premises.

TOGETHER with the tenants, hereditments and appurtenances thereunto belonging, or appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, the said premises, together with the appurtenances, unto the said party of the second part, and to its successors and assigns forever.

IN WITNESS WHEREOF, the said parties of the fist part have hereunto set their hands the day and year first above written.

A.M. Griswold
Nevada E. Griswold

STATE OF NEVADA, )
) ss.
County of Elko. )

On this twenty-fourth day of May A.D., one thousand nine hundred and thirty-two personally appeared before me, PEGGY O'NEILL, a Notary Public in and for the said County of Elko, A.M. GRISWOLD and NEVADA E. GRISWOLD, his wife, known to me to be the persons described in and who executed the foregoing instrument, who acknowledged to me that they executed the same, freely and voluntarily, and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal in the County of Elko, the day and year in this Certificate first above written.

Peggy O'Neill
Notary Public in and for
the County of Elko, State of
Nevada (SEAL)

Filed for Record at the Request of Henderson Bank, July 15th, A.D. 1958 at 15 min. past 3 o'clock P.M.,

Wm Rigsby
Recorder.

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[Elko County Deed Book 47 Page 132]

File No. 57626

HENDERSON BANKING COMPANY TO HENDERSON BANKING COMPANY MORTGAGE CORPORATION

THIS INDENTURE, Made this 16th day of May, 1934, between HENDERSON BANKING COMPANY a Banking Corporation organized and existing under and by virtue of the laws of the State of Nevada, the party of the first part, and HENDERSON BANKING COMPANY MORTGAGE CORPORATION, a corporation organized under and by virtue of the laws of the State of Nevada, the party of the second part,

WITNESSETH:

That WHEREAS, the party of the first part is a banking corporation duly incorporated and existing under and by virtue of the laws of the State of Nevada, and as such banking corporation acquired certain properties hereinafter described; and

WHEREAS, the Directors of said corporation duly assembled, duly passed the following resolution: "BE IT RESOLVED that WHEREAS, on the 8th day of March, 1934, in action No. 4661, in the First Judicial District Court of Nevada in and for the County of Ormsby, entitled Foreest W. Ecoles, et al, Plaintiff, vs Henderson Banking Company, a Nevada Banking Corporation, et al., Defendants, there was entered an Order wherein said Henderson Banking Company, a Nevada Banking Corporation and E. J. SEABORN, Superintendent of Banks in charge of said Henderson Banking Company were

ordered and directed to convey to a corporation to be formed for that purpose, all of the assets and property of every name, nature, kind and description belonging to said Henderson Banking Company; and

WHEREAS, in compliance with the direction of said Order HENDERSON BANKING COMPANY MORTGAGE CORPORATION a Nevada corporation was formed to take over the assets of said HENDERSON BANKING COMPANY: and

WHEREAS, the capital stock of said HENDERSON BANKING COMPANY MORTGAGE CORPORATION has been issued to the depositors of said Henderson Banking Company.

NOW, THEREFORE, IT IS RESOLVED by the Board of Directors of said Henderson Banking Company, a Nevada Banking Corporation, duly convened, that said Henderson Banking Company comply with the order and direction of said Court hereinbefore mentioned, and convey to HENDERSON BANKING COMPANY MORTGAGE CORPORATION, a Nevada Corporation, all of the assets, real, personal or mixed of every name, nature, kind and description belonging to said Henderson Banking Company, and that GEO. WINGFIELD, its President and HAIDEN HENDERSON, its Secretary, be and they are hereby authorized and directed to make, execute and deliver for and in behalf of said Henderson Banking Company, and as its act and deed to and HENDERSON BANKING COMPANY MORTGAGE CORPORATION, all necessary conveyances to carry all of the property of said Henderson Banking Company of every name, nature, kind and description to said HENDERSON BANKING

COMPANY MORTGAGE CORPORATION, and to affix to said conveyances the corporate name and seal of said corporation."

NOW, THEREFORE, in pursuance of said Resolution as aforesaid, and in consideration of the sum of ONE ($1.00) DOLLAR, lawful money of the United States in hand paid to said party of the first part, by said party of the second part, the receipt whereof is hereby acknowledged, and in compliance with the Order of Court above mentioned (the same being the actual consideration, and this being a confirmation deed, no revenue stamps required) said party of the first part does by these presents grant, bargain and sell unto the said party of the second part, and to its successors and assignees forever

> All of the right, title, interest and claim of the party of the first part in and to those certain lots, pieces or parcles of land, more particularly bounded and described as follows, to-wit:
>
> * * *
>
> Land Description Omitted
>
> * * *

TOGETHER with the tenements, hereditaments and appurtenances thereunto belonging or appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, the said premises, together with the appurtenances, unto the said party of the second part, and to its successors and assignees forever.

IT WITNESS WHEREOF, said party of the first part by resolution of its Board of directors has caused these presents to be subscribed by its President and Secretary and its corporate name and seal to be hereunto affixed, the day and year first above written.

(CORPORATE SEAL)

HENDERSON BANKING
COMPANY
By Geo Wingfield
President. –

ATTEST:
Hayden Henderson
Secretary. –

STATE OF NEVADA, )
) ss.
COUNTY OF WASHOE. )

On this 16th day of May, 1934, personally appeared before me, a Notary Public in and for the County and State aforesaid, GEO. WINGFIELD, known to me to be the President of the corporation that executed the foregoing instrument, and upon oath did depose that he is the officer of said corporation as above designated; that he is acquainted with the seal of said corporation, and that the seal affixed to said instrument is the corporate seal of said corporation; that the signatures to said instrument were made by officers of said corporation as indicated after said signatures; and that the said corporation executed the said instrument freely and voluntarily and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal the day and year in this Certificate first above written.

(SEAL)

M. Rice
Notary Public in and for the County of Washoe, State of Nevada.

My Commission Expires:
Jan. 24, 1938

STATE OF NEVADA, )
) ss.
COUNTY OF ELKO. )

On this 16th day of June, 1934, personally appeared before me, a Notary Public in and for the County and State aforesaid, HAYDEN HENDERSON known to me to be the Secretary of the corporation that executed the foregoing instrument and upon oath did depose that he is the officer of said corporation as above designated, that he is acquainted with the seal of said corporation, and that the seal affixed to said instrument is the corporate seal of said corporation; that the signatures to said instrument were made by officers of said corporations indicated after said signatures; and that the said corporation executed the said instrument freely and voluntarily and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official Seal the day and year in this Certificate first above written.

(SEAL)
My Commission Expires:
Sept 11 – 1935

Milton J. Reinhart
Notary Public in and for the County of Elko, State of Nevada.

Filed for record at request of Griswold & Reinhart, on the 16th day of June, 1934 at 10:55 o'clock A.M.,

Wm Rigsby
County Recorder

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# APPENDIX D

## No. 2804

## IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT

---

**In the Matter of the Determination of the Relative Rights of Claimants and Appropriators of the Waters of the Humbolt River System and Tributaries.**

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## FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE

GRAY MASHBURN, *Attorney-General.*
M. A. DISKIN, *Special Deputy Attorney-General.*

---

**Filed this 20th day of October, 1931**
**J.W. DAVEY, *Clerk***

THE BARTLETT DECREE

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that except such persons as may have acquired rights to the use of the water of Humboldt River stream system and its tributaries granted under applications to the State Engineer under and by virtue of the provisions of the statute, no person other than the parties named herein have or claim any interest in or to said water or in or to the use of said water or any part thereof.

That the order of the rights of the respective appropriators of the waters of said stream and its tributaries, and in which order they are entitled to divert and use the said water [for the period or season or time of year in

which the said right attached as herein provided] shall be and is [within the districts hereinafter created], according to the date of the relative priority of the right as herein set forth and determined, and the first in order of time according to the date of relative priority shall be and is the first in order of right, and so on, down to the date of the latest priority, and those having prior rights are entitled to divert and use the waters of said stream and its tributaries when necessary for the beneficial use in connection with the irrigation of their respective lands, or other useful and beneficial purposes for which they are decreed a right of use, at all times and against those having subsequent rights, without let or hindrance, and whenever the water is not required by the appropriator having a prior right to its use for the purpose for which said water was appropriated, he must and shall permit it to flow down in the natural channel of the stream as it was wont to flow in its natural course, without hindrance or diversion thereof, and those having subsequent rights are entitled to the use of such water and to divert the same to the extent of their rights of appropriations, according to the order of their priority rights; and at all times the waters diverted shall be beneficially, economically and reasonably used without waste by those having a right to do so by reason of the priority of their rights.

That the rights of appropriation hereby confirmed are appurtenant to the lands herein described for irrigation purposes, and the right of use of the waters of said stream and its tributaries by virtue of such rights of appropriation are limited and confined to the irrigation of the lands described herein to the extent of said lands as herein set forth, and the priorities herein confirmed confer no right of use of the waters of said stream, and its

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NOTE: – The words between brackets ordered stricken by Judge H. W. Edwards, see page 10, Sec. 2, Intervening Orders.

tributaries, on the lands other than those specified tracts to which such rights of appropriation are herein set forth as appurtenant. The right of a water user to change the place of use of a vested water right, in the manner, now or hereafter, provided or permitted by law shall not be prohibited or affected by this decree.

That in all cases where decrees of the Court or agreements of the parties have been filed in these proceedings, which said agreements or decrees have* not been mentioned in these findings, the water master shall distribute water as between the parties to said decree or agreements so long as such distribution does not interfere with any prior rights of claimants or appropriators not subject to or bound by such decree or agreements; but whenever the distribution of water in accordance with said decrees or agreements does interfere with any such prior rights, then said water may be distributed by the water master in accordance with this decree.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that for the purpose of distributing the waters of the Humboldt stream system and its tributaries in accordance with the provisions of this decree [the said stream system is hereby divided into two districts known as District No. 1 and District No. 2. District No. 1 is all that portion of the Humboldt River stream system and its tributaries being all the lands located below Palisade. District No. 2, known as the upper district, and consisting of all lands above Palisade.

That the State Engineer or Water Commissioner in the distribution of water shall distribute all water flowing in said stream system prior to May 15 to the claimants and appropriators situated in District No. 1. That all

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*Ordered, amended by inserting the words "or have" by Judge H. W. Edwards, see page 10, Sec. 2, Intervening Orders.

water flowing in said stream after May 15 shall be distributed to clainmants [sic] and appropriators situated in the upper district or district No. 2; that such distribution shall continue in said upper district until all priorities of a date equal to the date of priorities served in the lower district have been served; that after the serving of equal priorities in the upper district, if sufficient water is flowing in the river to reach claimants in the lower district, without waste, keeping in mind the location of the various places of use, the conditions of the stream flow, the season of the year, and the matter of transmission loss, evaporation and seepage, and equal distribution of the water between district No. 1 and district No. 2 shall be made to serve equal priorities.]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that subject to section 36a* of the Water Code, as amended, the beginning and ending of the irrigation season shall be as defined in this Decree except when climatic conditions are such that irrigation is not in accordance with good husbandry and actual beneficial use of water. The State Engineer shall then determine by examination the beginning of the irrigation season and shall set the date, giving notice to all water users on said stream system. The setting of this date shall be for the sole purpose of administration and distribution of the waters of the Humboldt stream system and its tributaries in accordance with this Decree.

[That the rate of flow in District No. 1 is based upon an irrigation system of the following approximate lengths: 180 days for Class A lands, 90 days for Class B

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NOTE: – All language between brackets ordered stricken and new paragraph substituted by Judge H. W. Edwards, see pages 10-11, Sec. 2, Intervening Orders.

*Ordered amended by inserting "Sec. 36½" by Judge H. W. Edwards, see page 11, Sec. 2, Intervening Orders.

lands, 45 days for Class C lands. That in District No. 2 the rate of flow for an irrigation season is as follows: 120 days for Class A lands, 60 days for Class B lands, and 30 days for Class C lands.

The State Engineer and Water Commissioner in distributing water to appropriators of the two districts will give due consideration to the head required to distribute the water over the land and to the water which returns to the stream system.]

That the claimants and appropriators or their successors in interest will not be required to take or use the amount of water allotted to them in a continuous flow, but may cumulate the same or any part thereof in rotation or periodic turn within the seasonal limits with the approval of the Water Commissioner and subject to the control and direction of the State Engineer.

Upon lands where conditions render it impossible to measure the amount of water diverted upon the land the duty of water as allotted will be modified and based upon that time limit of irrigation which is found to be most consistent with good husbandry; that where the classification of areas as herein indicated has been changed by any appropriator and the cultivated area reduced to a lower culture, the State Engineer or Water Commissioner shall allow the diversion of only so much water as is applicable to the then growing crop area.

All measurements of amounts diverted are to be made at the point where the main ditch enters or becomes adjacent to the land to be irrigated or as near thereto as practicable, the location if not selected by the State Engineer to be approved by him. Each water user shall install

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NOTE: – All language between brackets ordered stricken and new paragraph substituted by Judge H. W. Edwards, see page 11, Sec. 2, Intervening Orders.

and maintain substantial headgates and weirs in his ditch or ditches. Due allowance for losses in ditches will be made by the State Engineer in case it becomes necessary to divert additional water into said ditches.

Priorities are fixed by years and where the years are the same the priorities are equal unless otherwise specifically set forth.

In all cases where the acreages irrigated are bracketed with legal subdivisions, the water allotted is appurtenant to one or more legal subdivisions or parts of legal subdivisions within such bracket, but limited to the aggregate acreage and amount of water indicated for such bracket.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all claimants herein for water for irrigation shall be entitled to use such water for stock and domestic purposes. That the right to the diversion and use of the water for stock and domestic purposes shall be continued by such claimants and such water users at any time during the year, and such diversion shall be according to the dates of priority of such claimants, and such use shall be limited to the quantity of water reasonably necessary for stock and domestic purposes; that during the irrigation season the amount of water diverted for irrigation purposes shall not be increased by any amount to be used for stock and domestic purposes, but the quantity allowed and diverted for irrigation during the irrigation season includes the water for stock and domestic purposes.

That the duty of water of the cultured area is as follows: Harvest Crop, 3 acre feet; Meadow Pasture, 1.5 acre feet; and Diversified Pasture, .75 of an acre foot.

Harvest crop acres Class A, include all lands devoted to cultivated crops, also all irrigated native or other grass lands which normally receive sufficient water to produce

a crop which will justify cutting for hay, although it may sometimes be pastured and not cut.

Meadow pasture Class B, includes all grass lands free from brush which receive sufficient water to produce what may be classed as good pasture but not sufficient to warrant cutting for hay.

Diversified pasture Class C, includes all lands from which the brush has not been cleared but which are artificially irrigated to some extent for the production of grasses for pasturage. These lands shall be* watered only when the stream is in flood or when there is excess water above the needs of higher class culture. Also, this classification includes those areas in the irrigated fields which are grown up with willows, and the depression or other acres covered with tules and flags, if there is grass amongst them. While these latter areas generally receive as much or more water than is required for the higher class of culture, the excess water cannot be considered as being used beneficially, hence the right to divert it is not recognized.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that except as indicated in the Decree, all objections filed to the Final Order of Determination are hereby denied and overruled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that no claimant or appropriator along the stream system or its tributaries has a prescriptive right to the use of waters of said stream system or its tributaries.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each and every water user and claimant to the Humboldt stream system and its tributaries and

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*The words "shall be" ordered stricken and the words "are usually" inserted in lieu thereof by Judge H. W. Edwards, see page 7, Sec. 2, Intervening Orders.

each of their agents, attorneys, servants and employees, and their successors in interest and all and every person or persons acting in aid or assistance of the said parties or either of or any of them be, and that each of them is, hereby perpetually enjoined and restrained as follows, to wit:

(a) From at any time diverting or using any of the water of the Humboldt stream system and its tributaries hereinbefore mentioned, except to the extent and in the amount and in the manner and at the time or times set by this Decree to such respective party hereto allotted, allowed, prescribed and determined, or allowed by permits which have been or may hereafter be granted by the State Engineer of the State of Nevada.

(b) From diverting from the natural channel and from using any of the said water for irrigation or for any other purpose, in excess of the specific allotment herein set by this Decree, or in excess of the specific allotment under a permit granted or that may hereafter be granted by the State Engineer of the State of Nevada.

(c) From diverting from the natural channel and from using any of the said water in any other manner or for any other purpose or purposes or upon any other land or lands than as provided and prescribed by the terms of this Decree or by a permit granted or that may hereafter be granted by the State Engineer of the State of Nevada.

(d) From diverting from the natural channel and from using any of the said water at any other time or times than as specified and provided by the terms of this Decree or by a permit granted or that may hereafter be granted by the State Engineer of the State of Nevada.

(e) From in any manner meddling with, opening, closing, changing, injuring, or interfering with any headgates, weirs, water box, flume or measuring device, placed, installed or established by the State Engineer or

by his authority or direction, unless such act be done by the permission or authority of the Water commissioner, if during the period of his regulation or control of said water, or if not done during such period, then by virtue of the allowances, authority, terms and provisions of this Decree or by a permit granted or that may hereafter be granted by the State Engineer of the State of Nevada.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the costs in this proceeding amounting to ___ dollars is hereby assessed proportionately to claimants and appropriators of the Humboldt stream system and its tributaries based upon the amount of acreage set forth in this Decree to which water has been allotted.

Dated this 20th day of October, 1931.

GEO. A. BARTLETT,
*Former District Judge Presiding at the Trial.*

# APPENDIX E

## No. 2804

## IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT

---

**In the Matter of the Determination of the Relative Rights of Claimants and Appropriators of the Waters of the Humboldt River Stream System and Its Tributaries.**

---

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE

**H.W. Edwards,**
**Former Judge Presiding.**

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**Filed this 8th day of October, 1935**
**J. W. Davey, *Clerk***

The Edwards Decree

It Is Further Ordered, Adjudged and Decreed that the Clerk of the above-entitled Court be, and he hereby is, directed and ordered to amend, change and correct the printed copy of the Findings of Fact, Conclusions of Law and Decree of date, and filed in the above-entitled Court and matter. October 20, 1931, so as to make said Findings of Fact, Conclusions of Law and Decree, conform to and with these "amended, changed and corrected Findings of Fact, Conclusions of Law and Decree" by striking from the printed copy all that portion of page 31 beginning with the word "L. N. Carpenter" and down to and including the figures "1905" on page 46 thereof, and by striking all other matters of a similar nature appearing in the

Decree proper where those persons' rights have been set forth, so as to make the Decree. when so corrected, eliminate all matter referred to in the Findings of Fact appearing at pages 31 to 46 aforesaid.

H. W. EDWARDS,
*Judge Presiding.*

Dated this 7th day of October, 1935.

(2)

No. 00-838

IN THE

# Supreme Court of the United States

SOUTH FORK BAND OF THE TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS OF NEVADA, ET AL.,

*Petitioners,*

v.

SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT, ET AL.,

*Respondents,*

and

STATE ENGINEER OF THE STATE OF NEVADA, ET. AL.,

*Real Parties in Interest.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE NEVADA SUPREME COURT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANKIE SUE DEL PAPA
Attorney General of the
State of Nevada

PAUL G. TAGGART
*(Counsel of Record)*
Deputy Attorney General

100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1232

*Counsel for Respondents and Real Parties in Interest*

132 pp

## QUESTIONS PRESENTED

1. Whether the South Fork Band of the Te-Moak Tribe of Western Shoshone Indian's (the "Tribe") sovereign immunity was waived when it acquired state water rights established through a state court decree that expressly enjoined the conduct of successors-in-interest to those water rights.

2. Whether the United States of America is a necessary and indispensable party to a contempt action brought against a Tribe based upon the Tribe's off-reservation arrest of an officer of a state court when the Tribe undertook such conduct unilaterally, without any participation by the United States.

3. Whether the Nevada Supreme Court improperly implied an easement across the Tribe's reservation for the purpose of state regulation of the Humboldt River.

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## STATEMENT

The Humboldt River is located in northern Nevada and flows for over three hundred miles from the high mountains in and around Elko, Nevada, to the Humboldt Sink near Lovelock, Nevada. The Humboldt River is the primary water source for the agricultural and municipal communities that have developed along its banks.

The State Engineer of Nevada initiated an adjudication procedure for the Humboldt River in 1913. *Ormsby County v. Kearney*, 142 P. 803, 813 (Nev. 1914). From that date forward, the State Engineer was responsible for distribution of the water rights that were defined in his Order of Determination. NEV. REV. STAT. § 533.220(1) (1999); *Hinckley v. Sixth Judicial District Court*, 1 P.2d 105, 106 (Nev. 1931) (State Engineer could enforce Order of Determination before court entered final decree). The Sixth Judicial District Court of Nevada (the "Respondent Court") entered its final decree for the adjudication of the Humboldt River in 1931 and amended the decree in 1935. The State Engineer or the Water Commissioners have distributed the waters adjudicated in the decree as officers of, and under the supervision of, the Respondent Court ever since. NEV. REV. STAT. § 533.220(1) (1999).

As part of the Order of Determination issued by the State Engineer, and the final decree entered by the Respondent Court, decreed water rights were recognized for five ranches, each owned individually by A.J. Dewar, Clark Drown, A.M. Griswold, J.J. Hylton, and P.J. Ogilvie. P. App. at C-1 to C-21, R. App. at N-1.[1] These ranches are located at the headwaters of the South Fork of the Humboldt River, upstream from hundreds of other water rights that were recognized in the Humboldt Decree. These five ranches now comprise the South Fork Reservation where the Tribe resides, and the Tribe is the successor-in-

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[1] Citations to Petitioners' Appendix to its Petition for Writ of Certiorari are abbreviated herein as "P. App." Citations to Respondents' Appendix to this Brief in Opposition are abbreviated herein as "R. App."

interest to the water rights the Humboldt Decree recognized as appurtenant to those ranches.[2] The State Engineer or Water Commissioners have continued to be responsible for distributing decreed water rights to these ranches, just as they have since 1923.

The Tribe makes in its petition a number of factual assertions that were not litigated in the lower court proceedings to which the State objects. Particularly, the Tribe claims there are no state roads or federal rights-of-way on its reservation. This assertion has never been litigated, and the State reserves the right to challenge them hereafter.

As the successor-in-interest to decreed water right owners, the Humboldt Decree defines the basis, measure, and limit of the Tribe's water rights. For most of the last century a Water Commissioner from the Respondent Court has entered upon and across the land comprising the Tribe's reservation to regulate the Humboldt River and assure, pursuant to the Humboldt Decree, the Tribe receives its decreed water rights while upstream and downstream non-Indians receive their decreed water rights. Also, an assessment fee has consistently been paid for this service by the Tribe or the United States.[3] There has never been a substantial complaint that the State's actions in regulating the stream system on the reservation have ever harmed the Tribe's water rights or the Tribe's sovereignty or that the Tribe has been treated differently than any other water user in the Humboldt River system.

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[2] On March 3, 1925, the United States Congress appropriated $25,000 "[f]or the purchase of land, with sufficient water right attached, for the Te-Moak Band of homeless Indians in Ruby Valley, Nevada." Pub. L. No. 68-580, 43 Stat. 1141, 1149 (1925). Lands were purchased to create a reservation between 1937 and 1942. On February 8, 1941, a proclamation of then-Acting Secretary of the United States Department of the Interior A.J. Wirtz established the South Fork Indian Reservation in Elko County, Nevada. 6 Fed. Reg. 1203 (1941).

[3] Initially, these fees were paid by the United States on behalf of the Tribe, and from 1989 to at least 1993, the Tribe itself paid the fees. P. App. at A-3 to A-4.

## I. PROCEEDINGS BELOW.

Despite the historic cooperative relationship between the State and the Tribe that effectively provided equal protection of Indian and non-Indian water rights in the Humboldt River, the Tribe now claims the State does not have the authority to travel on or across its reservation to regulate the Humboldt River or assess fees against it.

On March 8, 1998, the Tribe's Council passed a resolution stating the Respondent Court's Water Commissioners are not allowed to regulate any of the upstream turnouts that supply the South Fork Reservation with irrigation water and the Tribal Council will not pay assessment fees charged for the Water Commissioners' service. R. App. at A-1. Such fees total between $2,000 and $3,000 per year. On May 22, 1998, the State Engineer issued Order 1145, directing the Tribal Council to comply with the Humboldt Decree. R. App. at B-1. *See* NEV. REV. STAT. § 533.220(2) (1999) (authorizing State Engineer to issue orders to enforce water right decrees). On June 2, 1998, the Tribe indicated it did not intend to comply with Order 1145, R. App. at C-1, and on August 11, 1998, the Tribe passed a resolution that declared "the State of Nevada Water Masters and employees must cease attempts to assess fees and regulate South Fork waters." *Id.* at D-1.

### A. Humboldt I.

Three contempt actions have been filed in the Respondent Court that involve the Tribe's violations of the Humboldt Decree and the state laws that were enacted to administer such decrees. The first action was filed against the Tribe and Marvin McDade, the band council chairman, on June 11, 1998 ("Humboldt I"). *See* NEV. REV. STAT. § 533.220(2) (1999) (State Engineer must petition decree court to review violations of orders of the State Engineer).

Humboldt I is a contempt proceeding invoking the Respondent Court's continuing jurisdiction over enforcement of the Humboldt Decree. Humboldt I was amended to name the United States as a respondent, and the United States

removed to federal court. The State filed a motion to remand. After denying the State's motion, *State Engineer v. South Fork Band*, 66 F. Supp. 2d 1163 (D. Nev. 1999), on August 24, 2000, the federal court reversed itself and remanded Humboldt I to the Respondent Court based on the *Colorado River* doctrine. *State Engineer v. South Fork Band*, 114 F. Supp. 2d 1046 (D. Nev. 2000). The United States and the Tribe filed appeals from that ruling which are pending in the Ninth Circuit Court of Appeals. *United States, et al. v. State Engineer of Nevada, et al.*, No. 00-17146 (9th Cir. 2000).[4]

**B. Humboldt II.**

The second action that involves the Tribe's violation of the Humboldt Decree was filed against the United States on November 9, 1999 ("Humboldt II"). Humboldt II was filed in an effort to force the United States to pay outstanding assessment fees. The United States had paid the fees for many years, and the State argues the United States remains liable for payment of the fees. In Humboldt II the United States filed a notice of removal. The State filed a motion to remand, and the federal court remanded Humboldt II. The United States' appeal from that ruling is also pending in the Ninth Circuit Court of Appeals. *Id.*

**C. Humboldt III.**

A third contempt action was filed in the Respondent Court against the Tribe and Mr. McDade on November 9, 1999 ("Humboldt III"). The Tribe filed an extraordinary writ in the Nevada Supreme Court to prohibit the Respondent Court from considering Humboldt III. After the Nevada Supreme Court denied that writ, the Tribe filed this petition for writ of certiorari.

As part of Humboldt I, the federal court issued a preliminary injunction enjoining the Tribe and Mr. McDade

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[4] Additionally, the State cross-appealed to challenge the federal court's rejection of the State's argument that the Respondent Court has exclusive jurisdiction over all matters arising under the Humboldt Decree.

from prohibiting the Water Commissioners from entering the reservation to regulate headgates on the reservation. R. App. at E-1. Also, the federal court ruled the right of a Water Commissioner to cross the reservation to reach tribal headgates on private land involved issues outside the scope of the proceeding before it. R. App. at F-6.

On September 13, 1999, Wayne Testolin, the Supervising Water Commissioner for the Humboldt Decree, and two other Water Commissioners, went to the South Fork of the Humboldt River to regulate the river in compliance with the Humboldt Decree. P. App. at A-5. After regulating downstream users, the Water Commissioners went onto the reservation to regulate the river. Part of the Tribe's water rights is served by diversions located on the Gund Ranch which can only be reached via a road crossing the reservation. *Id.* It is impossible to properly regulate the Tribe's water rights, as well as the Gund's water rights, without regulating the diversions located on the Gund Ranch. *Id.*

When the Water Commissioners entered the reservation, they were followed by a tribal peace officer. Believing they were authorized by state law and the Humboldt Decree to enter the Gund property to regulate the Tribe's water rights and private water rights, the Water Commissioners traveled off the reservation and onto the ranch. When the Water Commissioners entered the ranch, they were promptly stopped by the tribal peace officer. Mr. McDade accompanied the officer. Mr. McDade said the Water Commissioners did not have the right to be on the Gund Ranch. Mr. Testolin was concerned that Mr. McDade would hit him, as he was pounding on a truck with his fist, was openly hostile to the Water Commissioners, and referred to them in derogatory terms. Mr. McDade made the Water Commissioners turn around to escort them back to the tribal office. Once on the reservation, the officer stopped the Water Commissioners. Mr. McDade ordered the officer to arrest Mr. Testolin. The officer put handcuffs on Mr. Testolin, charged him with trespass, and drove him

off the reservation. The other two Water Commissioners picked up Mr. Testolin at that point. R. App. at G-1.

In response to this event, the State Engineer entered Order 1154, R. App. at H-1, stating he and the Water Commissioners are entrusted by statute with the responsibility of enforcing the Humboldt Decree and he and the Water Commissioners could enter the reservation. The State Engineer described the arrest of Mr. Testolin and stated the Water Commissioners are officers of the Sixth Judicial District Court of Nevada and any interference with them constitutes contempt of court. The State Engineer then ordered the Tribe, within five (5) days, to signal its intent to permit the Water Commissioners access to regulate upstream diversions that supply the reservation with water, including diversions on private land that can only be reached by traveling through the reservation. The Tribe did not respond to State Engineer Order 1154.

On November 9, 1999, pursuant to NEV. REV. STAT. § 533.220 (1999), the State Engineer initiated Humboldt III by filing a petition for an order to show cause why the Tribe and Mr. McDade should not be held in contempt. P. App. at A-5. The Tribe and Mr. McDade filed a motion to dismiss the petition, arguing the Respondent Court lacks jurisdiction, the Tribe has sovereign immunity, and the United States is a necessary and indispensable party to the action. After holding a hearing, the Respondent Court denied the Tribe's motion to dismiss. Challenging the Respondent Court's ruling, the Tribe filed a petition for an extraordinary writ in the Nevada Supreme Court. *Id.*

On April 11, 2000, Water Commissioners rented a plane and flew over the reservation to inspect water usage on and above the reservation. The Water Commissioners determined the Tribe was using water for irrigation purposes before the irrigation season and an unauthorized storage reservoir had been constructed on the Gund Ranch. R. App. at I-1.

On August 24, 2000, the Nevada Supreme Court denied the Tribe's petition for an extraordinary writ, ruling the Tribe waived its immunity, the Respondent Court has jurisdiction over them, and the United States is not a necessary and indispensable party in Humboldt III. The Tribe filed this petition for a writ of certiorari to challenge the Nevada Supreme Court's ruling.

After the Nevada Supreme Court denied the Tribe's petition for extraordinary writ, the Respondent Court scheduled a hearing on the State's contempt charge against the Tribe and its chairman. The Tribe requested a stay of that hearing from the Nevada Supreme Court and this Court. In its motions for stay, the Tribe raised the same arguments that are raised in its petition for a writ of certiorari. Both Court's denied the Tribe's request for a stay. R. App. at J-1.

The Respondent Court held a contempt hearing and entered an order finding the Tribe in contempt-based on its interference with the efforts of the court's officers to regulate the Humboldt River. R. App. at K-30 to K-37. The Tribe has appealed that order to the Nevada Supreme Court.

## II. IMPACT OF TRIBE'S ASSERTION OF IMMUNITY.

The importance of water in Nevada cannot be overstated. Physical and economic survival depends on a reliable water supply. Nevada water law establishes procedures to control the appropriation of the state's water to provide reliable distribution of water in the future. R. App. at L-3 to L-8.

Nevada's statutory procedure for the adjudication of water rights, NEV. REV. STAT. §§ 533.090–.320 (1999), was established to create a system for the orderly distribution of water rights under state control and to avoid vexatious litigation over the ownership and distribution of water rights. *Hinckley*, 1 P.2d at 106, ("waters of the stream may be distributed under public supervision without needless

waste or controversy."); *Ormsby County v. Kearney*, 142 P. at 805 ("It is difficult to perceive how there may be any effective regulation or control over the water rights of a stream system like that of the Humboldt River and its tributaries, except through some form of state supervision."). *See In re Manse Spring*, 108 P.2d 311, 316 (Nev. 1940) (adjudications undertake to ascertain water rights and set methods of control). The Humboldt Decree was entered for this purpose, and its entry was conclusive upon all persons and rights lawfully embraced within the adjudication. NEV. REV. STAT. § 533.210 (1999); *Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983).

The Tribe's assertion of immunity, and its prohibition of officers of the Respondent Court from traveling on or across its reservation, poses a significant threat to all downstream water right owners on the Humboldt River. The Tribe's reservation is at the headwaters of the South Fork of the Humboldt River posing a serious threat to management of the entire Humboldt water system. Whenever the Tribe uses more water than it is entitled to, someone on the Humboldt River is irreparably harmed. R. App. at F-2 to F-5. The Tribe has proven that, without state regulation, it cannot regulate its own water use in compliance with the Humboldt Decree. *Id.* The Tribe's exclusion of State regulators has allowed illegal water usage for irrigation on the reservation and unauthorized water storage on private land that can only be accessed by crossing the reservation. R. App. at I-1. Accordingly, the Tribe's assertion of immunity defeats the whole purpose of the Humboldt Decree—to establish an orderly distribution of water rights through state control.[5]

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[5] Typically, Water Commissioners would shut off headgates that serve a water right owner who is not complying with a decree. This remedy is inappropriate here because the natural channel of the river flows through the reservation.

## REASONS FOR DENYING THE PETITION

In addition to the fact the Nevada Supreme Court's ruling was correct, as articulated below in the argument section of this brief, for the following reasons this petition should be denied because compelling reasons do not support issuance of the writ. First, the decision of the Nevada Supreme Court involves an issue of state water law, a field in which Congress has expressly deferred to state law governance over federal and tribal water rights. *Arizona v. San Carlos Apache*, 463 U.S. 545 (1983); *California v. United States*, 438 U.S. 645 (1978); *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *Broder v. Natoma Water & Mining Co.*, 101 U.S. 274 (1879). *See* 43 U.S.C. § 666 (1994).

Second, the decision of the Nevada Supreme Court is a preliminary decision involving the denial of a petition for extraordinary writ. The Tribe currently has an appeal pending in the Nevada Supreme Court considering the same matter, and if that appeal is decided in its favor, this Court will never need to consider this matter.

Third, while the Nevada Supreme Court may have ruled on an important federal issue, i.e. tribal sovereign immunity, the Nevada Supreme Court's ruling was not in conflict with rulings from federal courts and other state courts. As argued more fully herein, the Nevada Supreme Court's ruling regarding tribal immunity is wholly consistent with the federal court's ruling in Humboldt I and other federal rulings in similar cases. *State Engineer v. South Fork Band*, 66 F. Supp. 2d 1163 (D. Nev. 1999). *See McClendon v. United States*, 885 F.2d 627, 629 (9th Cir. 1989); *United States v. Oregon*, 657 F.2d 1009, 1015 (9th Cir. 1981). *See generally Bird Bear v. McLean County*, 513 F.2d 190 (8th Cir. 1975). Further, the immunity ruling in Humboldt I is pending on appeal in the Ninth Circuit, and the Tribe may petition this Court to review the decision resolving that appeal. Finally, the Nevada Supreme Court's ruling is consistent with rulings from other state supreme courts. *Anderson & Middleton Lumber Company v. Quinault Indian*

*Nation*, 929 P.2d 379 (Wa. 1996); *Native Village of Eyak v. G.C. Contractors*, 658 P.2d 756 (Alaska 1983).

Fourth, as argued herein, the Nevada Supreme Court's ruling is not in conflict with relevant decisions of this Court. *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989); *United States v. Wheeler*, 435 U.S. 313 (1978).

Fifth, the Tribe's petition should be denied because the Nevada Supreme Court did not issue a ruling on an important question of federal law that should be settled by this Court. While the issue at bar may be one of first impression, the issue was resolved through the application of state law and the proper recognition of relevant federal law. Also, as admitted by the United States in related correspondence, the facts underlying this case are unusual, meaning they will not be oft repeated. R. App. at O-2.

Sixth, the Tribe's petition should be denied because writs of certiorari are rarely granted when the asserted error consists of a misapplication of a properly stated rule of law. SUP. CT. R. 10. Here assuming arguendo the Nevada Supreme Court erred, it properly stated the rule of law governing waivers of tribal immunity. P. App. at A-6.

## SUMMARY OF ARGUMENT

After the State completed a judicial proceeding that recognized water rights on the Humboldt River, the Tribe acquired water rights that had been recognized in that proceeding. The Tribe's rights are diverted from headgates located on the reservation and on private land that can only be reached by crossing the reservation. Although State officials from 1923 to 1998 regulated the Tribe's rights, in 1999 the Tribe arrested a Water Commissioner while he was attempting to regulate the Tribe's water rights.

The Tribe's claim of immunity from this action is incompatible with the nature of its water rights. All water rights in Nevada created under state law are burdened by the State's right to control their distribution. The Tribe and the United States acquired water rights with that burden

attached, and the Tribe respected the State right of control for 55 years. The Tribe cannot accept the benefits of its rights without accepting the burdens. Given the nature of the Tribe's water rights, the Nevada Supreme Court properly ruled the Tribe's immunity was waived when deeds were executed to acquire state-created water rights.

The Tribe's claim that the United States should be a party in this case was properly denied by the Nevada Supreme Court because this is a contempt proceeding concerned only with the Tribe's conduct, not the United States', and the United States' interest in the Tribe's water rights cannot be affected by this proceeding.

The Tribe's claim that the Nevada Supreme Court improperly implied an easement across the Tribe's reservation is without merit. The Nevada Supreme Court properly recognized the burden of State control encumbering the Tribe's water rights but did not imply a real property right in the State burdening the Tribe's reservation.

## ARGUMENT

### I. THE NEVADA SUPREME COURT PROPERLY RULED THE RESPONDENT COURT HAS JURISDICTION OVER THE TRIBE AND MR. MCDADE BECAUSE THE TRIBE'S SOVEREIGN IMMUNITY FROM ACTIONS BROUGHT TO ADMINISTER THE HUMBOLDT DECREE WAS WAIVED.

The Respondent Court, the Nevada Supreme Court, and the federal court correctly rejected the Tribe's immunity claim.

#### A. Proceedings Below.

The Respondent Court held that when the Tribe's water rights were purchased, the deeds were contracts that conveyed to the Tribe only what the sellers of those water rights had. "The sellers of those water rights had decreed water rights that were burdened by the obligations of the Humboldt Decree. In fact, the deeds for the five ranches

mentioned each ranch's appurtenant water rights, or the Humboldt Decree." R. App. at M-3. Hence, the Respondent Court properly ruled that the United States, by voluntarily purchasing state-adjudicated water rights, chose to waive any immunity the Tribe might have to an action brought by the Respondent Court relating to the administration of those water rights. *Id.*

The Respondent Court's holding is consistent with the federal court's ruling in Humboldt I. The Tribe sought dismissal of Humboldt I by asserting sovereign immunity from the Respondent Court's jurisdiction. *State Engineer v. South Fork Band*, 66 F. Supp. 2d 1163, 1172 (D. Nev. 1999). The federal court ruled the United States waived the Tribe's sovereignty by purchasing water rights that were subject to the Respondent Court's jurisdiction. *Id.*

The federal court noted the parties who owned the Tribe's water rights during the adjudication of those rights participated in the adjudication, making them subject to the Respondent Court's jurisdiction. Further, after the decree was entered, those individuals used their water rights subject to the requirements of the decree. *Id.* Accordingly, the federal court held that when the United States:

> [P]urchased the rights for the Tribe, it could only purchase what the prior owners owned--that is, the rights subject to the Decree. By choosing to purchase such rights, the U.S./Tribe chose to put itself in a position where it would be subject to the Decree, and thus waived its immunity.

*Id.* Unequivocally, the federal court stated:

> If there remained any doubt as to the United State's [sic] express and unequivocal waiver in behalf of the Tribe, in its initial purchase of the decreed rights, the Tribe's actions over the ensuing fifty years since the purchase of their decreed water rights clearly demonstrate a continuing ratification of its initial waiver of

> immunity. . . . We therefore hold that the Respondent Tribe has waived its tribal immunity with regard to its voluntarily assumed contractual and judicial successor-in-interest water rights under the Humboldt Decree, and thus cannot assert such immunity in actions to enforce that Decree.

*Id.*

The Nevada Supreme Court agreed with the Respondent Court and the federal court. After recognizing a waiver of tribal immunity may not be implied, but must be expressed unequivocally, the Nevada Supreme Court acknowledged, "some courts have concluded that a tribe, by its actions, may consent to suit." P. App. at A-6. The court concluded "the purchase of the reservation land subject to previously adjudicated water rights constituted an express waiver of sovereign immunity, and that the Tribe's actions in benefiting from and abiding by the Humboldt Decree for more than five decades served to ratify this waiver." *Id.* at A-7. To hold otherwise, the Court held, "would frustrate the district court's authority over matters arising out of the administration of the [Humboldt] Decree." *Id.* at A-8 to A-9.

### B. Waiver Of Tribal Immunity Through Acquisition Of State-Created Water Rights Subject To State Control.

Every water right created under Nevada law is subject to state control. When the United States and the Tribe acquired water rights created under Nevada law, they accepted the benefits and burdens of those rights; one burden being the state's right of control. Accordingly, because the United States and the Tribe voluntarily acquired Humboldt Decree water rights, the Nevada Supreme Court properly ruled the Tribe's sovereign immunity was waived.[6]

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[6] For this reason, the Tribe's mention of the Treaty of Ruby Valley, Tribe's Petition at 2, is irrelevant. The water rights at issue are

### 1. Nature Of A Water Right In Nevada.

Implicit in Nevada's water law, and the water law of all western states, is the concept that a water right is a usufructuary right. *Hinckley*, 1 P.2d at 107 ("no title can be acquired to the public waters of the state by capture or otherwise, but only a usufructuary right can be obtained therein.") While a water right is considered real property, the usufructuary nature of the right yields to its owner only a right of use subject to state regulation and control.[7] *Bergman v. Kearney*, 241 F. 884, 893 (D. Nev. 1917) ("the idea that an individual has a vested right to enjoy the use of running water without public regulation or control is subversive of the sovereignty of the state"); *In re Fillippini*, 202 P.2d 535, 538 (Nev. 1949) ("an appropriation is a method of acquiring a right to the use of water from the government"). Accordingly, any water right acquired in Nevada through the prior appropriation process is subject to proper state regulation. *In re Manse Spring*, 108 P.2d at 316 (water law undertakes to set up methods of control for water distribution).

Hence, while a water right acquired through prior appropriation is real property, it has limitations foreign to other forms of real property. Viewed as a bundle of sticks, a water right includes a stick which represents a usufructuary right of use. A water right also includes a stick which represents the limitations on water use that are created by proper state regulation and are rooted in the public's original ownership of all the state's waters. Proper state regulation includes state distribution of water and state court jurisdiction over enforcement of a water rights decree.

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state-created rights, not reserved water rights, so the date of the Treaty of Ruby Valley is inconsequential to this case. These state water rights are superior and senior to any alleged reserved rights. R. App. at O-3. Most importantly, the Tribe did not raise the treaty as an issue in the lower court proceedings.

[7] The legal genesis of the usufructuary limitation on water rights is the understanding that all waters within the State of Nevada belong to the public. NEV. REV. STAT. § 533.025 (1999).

The Tribe voluntarily accepted this bundle of sticks when the reservation was created on land with appurtenant water rights. Accordingly, the Nevada Supreme Court properly ruled the Tribe is subject to the Respondent Court's jurisdiction for the purpose of enforcing the State's right of control over the distribution of the Tribe's water rights.

**2. Tribal Immunity.**

The Tribe asserts that its immunity has not been waived because an express written statement of such a waiver does not exist within the deeds of conveyance of its water rights.[8] This contention is without merit.

A Tribe may waive its immunity by acquiring property that is subject to a court's jurisdiction. *United States v. Oregon*, 657 F.2d 1009, 1015 (9th Cir. 1981) ("[t]o hold . . . tribal immunity blocks modification of an equitable decree would impermissibly violate a central tenet of equity jurisprudence, that of flexible decrees."); *Anderson & Middleton Lumber Company v. Quinault Indian Nation*, 929 P.2d 379 (Wa. 1996) (tribe waives immunity to state court *in rem* partition action by acquiring property subject to such *in rem* action).

The United States may waive a Tribe's sovereign immunity. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 890-91 (1986). "Unlike the states, Indian tribes possess only limited sovereignty that is subject to complete defeasance." *Donavan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985). "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete

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[8] While this Court has stated tribal waivers must be explicit, it has never required the invocation of "magic words," stating the Tribe hereby waives its sovereignty. *Val-u Constr. Co. v. Rosebud Sioux Tribe*, 146 F.3d 573, 577 (8th Cir. 1998). Accordingly, tribes can waive their sovereign immunity by executing contracts which contain an arbitration clause. *Native Village of Eyak v. G.C. Contractors*, 658 P.2d 756, 761 (Alaska 1983).

defeasance. But until Congress acts, the tribes retain their existing sovereign powers." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Such defeasance may include limiting a tribe's sovereign immunity.

With respect to waivers of tribal power by the United States, in certain circumstances, the United States can waive such power by implication. *Id. See generally Bird Bear v. McLean County*, 513 F.2d 190 (8th Cir. 1975) (tribal right to exclude divested by implication in creation of reservation). Tribal powers can be divested by implication when "the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government." *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 427 (1989).

### 3. Acquisition Of State-Created Water Rights.

When Congress acted by directing the United States to acquire water rights in Nevada, the United States purchased water rights that had been adjudicated in the Humboldt Decree. As evidenced by the deeds of conveyance, the United States and the Tribe expressly, intentionally, and voluntarily acquired land, water rights, and encumbrances, one being the Respondent Court's jurisdiction. Each deed expressly conveyed all appurtenant water rights, and one deed expressly stated it conveyed,

> all [water] rights decree [sic] to the first parties or either of them or to their predecessors in interest, as appurtenant to said lands or any part thereof, in the final decree of the Sixth Judicial District Court of the State of Nevada, in and for the County of Humboldt, in the matter of the determination of the relative rights of the claimants and

> appropriators of the water of the Humboldt River Stream system and its tributaries.

R. App. at N-2.[9]

The United States and Tribe's execution of these deeds divested the Tribe's immunity because its exercise of immunity is completely inconsistent with the overriding interest of the National Government.[10] *McClendon v. United States*, 885 F.2d 627, 629 (9th Cir. 1989). The interest of the National Government has been to respect state water laws, even as those laws pertain on federal land. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154 (1935). Congress was forced to accept the accomplished facts of state water law and ownership, rather than adopt a new general federal water law. *California v. United States*, 438 U.S. 645, 656 (1978); *Broder v. Natoma Water & Mining Co.*, 101 U.S. 274, 276 (1879).

Federal acquiescence to state water law was reaffirmed in the McCarran Amendment. Introduced and sponsored by Nevada Senator Patrick McCarran, Congress adopted the McCarran Amendment, 43 U.S.C. § 666 (1994), to waive the immunity of the United States, and any person claiming ownership through the United States, because the assertion of such immunity completely defeats important, long-established water administration procedures. *Arizona v. San Carlos Apache*, 463 U.S. 545, 567 (1983) (holding that Indian water rights are subject to state court adjudications). Specifically, Congress stated:

> [i]t is apparent that if any water user claiming to hold [a water] right by reason of the ownership thereof by the United States or any of its departments is permitted to claim

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[9] While the Tribe properly included other deeds in its Appendix, it neglected to include this deed, or this pivotal language.

[10] This case is distinguishable from *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), because this case involves a congressional act that necessitated the defeasance of tribal immunity. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).

> immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water from the beneficial use by the other water users who are amendable to and bound by the decrees and orders of the State courts.
>
> . . . .
>
> If a water user possessing a decreed water right is immune from suits and proceedings in the courts for the enforcement of valid decrees, then the years of building the water laws of the Western States in the earnest endeavor of their proponents to effect honest, fair and equitable division of the public waters will be seriously jeopardized.

S. REP. NO. 755, 82d Cong., 1st Sess. 4-5 (1951). In order to remedy this situation, which "cannot help but result in a chaotic condition," *id.*, Congress directed that State courts should be able to enforce their decrees against water users who claim their rights through purchases by the United States.[11]

Given the historical deference of Congress to state water law, and the implications reflected in the McCarran Amendment, it is clear the interest of the national government has been, and continues to be, respect for state water laws. This policy serves to protect and preserve the established systems of water allocation in the western states. When Congress directed that water rights be bought for the Tribe, this national interest directed the rights to be purchased with the concomitant burden of state regulation.

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[11] The reason the McCarran Amendment does not apply directly in this case is because the amendment expressly states that its provisions apply when the United States is a necessary party to a state action. 43 U.S.C. § 666 (1994). Here, as argued below, the United States is not a necessary party. Nonetheless, the McCarran Amendment provides valuable evidence of Congress's intent and the overriding interests of the National Government.

Further, it cannot be legitimately argued that the Tribe's interest in self-government cannot be preserved by state regulation of their water rights because such regulation has occurred for over fifty years without injury. *Brendale*, 492 U.S. at 426 (citations omitted) (exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes).

Since the overriding national interest respects state water laws, and tribal power over water distribution is "beyond what is necessary to protect tribal self-government," when the United States purchased water rights for the Tribe, the United States waived the Tribe's sovereign immunity from actions filed against it in Respondent Court to administer those water rights.[12] *See Oregon*, 657 F.2d at 1015.[13]

### C. Respondent Court's Exclusive Jurisdiction Over Humboldt River.

Another critical aspect of this action is the Respondent Court's exclusive jurisdiction over the Humboldt Decree.[14]

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[12] The Tribe asserts it is not clear whether the McCarran Amendment waived the United States' immunity from an enforcement action arising out of an adjudication that occurred prior to passage of the McCarran Amendment. Tribe's Petition at 8 n.9. The federal court, relying on *United States v. Hennen*, 300 F. Supp. 256 (1968), denied this argument. *State Engineer v. South Fork Band*, 66 F. Supp. 2d 1163, 1180-81 (D. Nev. 1999). Nonetheless, this issue is not raised in this case, and this issue is currently pending before the Ninth Circuit in the Tribe's and the United States' appeals from the federal court's order of remand.

[13] The Tribe further alleges that it took no affirmative act to waive its immunity. Tribe's Petition at 9. However, the federal court ruled the Tribe waived its immunity by affirmatively joining in the United States' removal of Humboldt I. *South Fork Band*, 66 F. Supp. 2d at 1172-73.

[14] As stated above, this issue is currently pending in the Ninth Circuit.

### 1. Water Rights Decrees.

An adjudication is an *in rem* proceeding involving a court's custody over the water in a stream system. *United States v. Alpine Land & Reservoir Company*, 174 F.3d 1007 (9th Cir. 1999). Through the appropriation of water, a water right attaches to land making whoever owns the land entitled to receive the appurtenant water right. A decree formally recognizes appurtenant water rights. Successors-in-interest to the owners of land with decreed water rights are subject to a decree court's jurisdiction, often through injunctive language contained within the decree, despite their personal absence from the judicial phase of the adjudication. *See* NEV. REV. STAT. § 533.210 (1999).

A court that enters a water rights decree has exclusive jurisdiction over all matters arising under that decree.[15] *Alpine Land*, 174 F.3d at 1013-14. *See Kline v. Burke Const. Co.*, 260 U.S. 226, 234 (1922); *Bergeron v. Loeb*, 675 P.2d 397, 400 (Nev. 1984), *cert. denied*, 469 U.S. 1212 (1985). Jurisdiction must be exclusive because water right decrees are complex and comprehensive, and conflicting interpretations of such a decree would be unworkable. *Alpine Land*, 174 F.3d at 1013-14.

### 2. Humboldt Decree.

Given these authorities, and because "it is elementary that the court against which a contempt is committed has exclusive jurisdiction to punish for such contempt," *United States v. Barnett*, 330 F.2d 369, 385 (5th Cir. 1963); *see In re Debs*, 158 U.S. 564, 595 (1895); *McGee v. McGee*, 340 S.E.2d 571, 573 (S.C. App. 1986), the Respondent Court has exclusive jurisdiction over this matter. *State Engineer v. Sustacha*, 826 P.2d 959, 961 (Nev. 1992) ("litigation concerning the Humboldt Stream System water rights should be carried out and resolved *only* in the [Respondent Court]").

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[15] *See Covell v. Heyman*, 111 U.S. 176, 182 (1884); *Peck v. Jenness*, 48 U.S. (7 How.) 612 (1849); *Hagan v. Lucas*, 35 U.S. (10 Pet.) 400 (1836).

The Respondent Court's exclusive jurisdiction was acquired when it obtained control over the waters of the Humboldt River by adjudicating the water rights in that river. The Respondent Court must have exclusive jurisdiction over contempt proceedings involving violations of its decree because a decree court's power to afford a remedy is necessary to effectuate its jurisdiction over the *res*. Without such power, the Respondent Court is powerless to protect downstream water right owners on the river.

In Nevada, any individual or entity that violates a final decree or frustrates the actions of a decree court's officers in their administration of a water rights decree is in contempt. *State ex rel. Malone v. Sixth Judicial Dist. Court*, 286 P. 418, 419 (Nev. 1930); NEV. REV. STAT. § 22.010(3) (1999). Upon the discovery of such contemptuous action, the State Engineer may initiate an enforcement action. NEV. REV. STAT. § 533.220(2) (1999). *See Sustacha*, 826 P.2d at 961; *McCormick v. District Court*, 218 P.2d 939, 944 (Nev. 1950).

### 3. Jurisdiction Over Tribe.

In this case the Respondent Court's jurisdiction over the Tribe for enforcement of a contempt action is rooted in its obligation to protect the *res*—the Humboldt River—and the injunctive language in the Humboldt Decree pertaining to successors-in-interest to decreed water right owners. The Respondent Court's obligation to protect the *res* and its Water Commissioners gives the Respondent Court the authority to find any person in contempt who threatens the *res* or the commissioners. Here the Tribe arrested a Water Commissioner and will not allow the Court's officers to regulate the river, thereby foreclosing any ability of the Court to assure the Tribe and the other upstream water users are only taking the proper quantity of water, during the proper season, pursuant to the Humboldt Decree.

More importantly, because the Tribe arrested a Water Commissioner, the Respondent Court must act to protect its officers from harassment, avoid bodily injury, and protect the machinery the Court has to protect decreed

water rights. For similar reasons, the Nevada Supreme Court ruled in *Sustacha, Malone,* and *McCormick* that it is essential that a decree court have jurisdiction over anyone who threatens its ability to enforce its decree. *See Oregon,* 657 F.2d at 1015 ("To hold at this stage that tribal immunity blocks modification of an equitable decree would impermissibly violate a central tenet of equity jurisprudence, that of flexible decrees."). *United States v. Crookshanks,* 441 F. Supp. 268 (D. Or. 1977) (Court with in rem jurisdiction may enforce injunction against non-parties).

The injunctive language in the Humboldt Decree strengthens the Respondent Court's jurisdiction over the Tribe. The Humboldt Decree enjoins successors-in-interest to decreed water right holders from interfering, opening, or closing headgates without the permission of the Water Commissioner. P. App. at D-8 to D-9. Implicit in this restriction is the fact that a Water Commissioner must have access to each water right owner's, or successor-in-interest's, headgate to regulate water rights. Since the Tribe is a successor-in-interest, and because it violated an injunctive provision directed at successors-in-interest, the Nevada Supreme Court properly ruled the Respondent Court has jurisdiction over the Tribe.

## II. THE UNITED STATES IS NOT NECESSARY AND INDISPENSABLE TO THIS ACTION.

The Tribe argues this contempt action should be dismissed because the United States is a necessary and indispensable party. Specifically, the Tribe argues this is an action against property owned by the United States, thereby mandating the United States' presence in this case.

The Nevada Supreme Court rejected this argument because the actions complained of are those of the Tribe, not of the United States, and the property interest of the United States cannot be affected by the contempt action. Specifically, the Nevada Supreme Court held:

> Petitioners, not the United States, created and adopted the resolutions that frustrated and interfered with the water commissioners' efforts to regulate the Humboldt River. Although the United States, as trustee, is the legal owner of the property and accompanying water rights, the interests of the United States will not be affected by the contempt proceedings.

P. App. at A-9 (citations omitted).

The Nevada Supreme Court's ruling is correct for two reasons. First, this action is directed at the Tribe only. In *McCormick*, 218 P.2d at 939, the Nevada Supreme Court reviewed a contempt action that was brought against individuals for interfering with Water Commissioners by constructing a dam on the Quinn River without authority. The contemners were building the dam on an Indian reservation with the assistance of the United States Bureau of Indian Affairs. *Id.* at 942-43. The contemners argued the United States was a necessary party to the action because it "has an interest in the maintenance of the dam and assisted in the construction of the dam . . . ." *Id.* The contemners also claimed the contempt action could result in the destruction of federal property. *Id.* The *McCormick* court rejected the same argument made by the Tribe here. The court commented "where contemners have voluntarily or contumaciously brought on themselves the disability to obey the order or decree" the defense that another is necessary to the action is not available. *Id.*

*McCormick* applies directly to this case. The Tribe took it upon itself to violate the Humboldt Decree. The Tribe passed resolutions in defiance of the Humboldt Decree and arrested a Water Commissioner. While the United States may have a trust responsibility to correct this action, it did not force the Tribe to take this action. The Tribe "voluntarily or contumaciously brought on themselves the disability to obey the order or decree." In fact, the United States has admitted the State has the

responsibility to administer the Humboldt Decree on the reservation, R. App. at O-4, the Tribe is obligated to comply with the Humboldt Decree, *id.*, and this is a case where the Tribe needs to be "protected from itself." *Id.* at O-6. Therefore, the United States is not necessary and indispensable to this action.[16]

Second, this action cannot impact the United States' legal interest as a trustee over the Tribe's property. When the Humboldt Decree was entered, it defined the basis, measure, and limit of the water rights at issue. Those rights cannot be changed. Once a decree is entered, *res judicata* applies to prohibit the alteration of those rights. *Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983). Accordingly, the United States' legal interest cannot be affected by this action and the United States is not necessary as a party to this action.[17]

## III. THE TRIBE'S RIGHT TO EXCLUDE NON-INDIANS FROM ITS RESERVATION DOES NOT ALLOW IT TO EXCLUDE WATER COMMISSIONERS.

The Tribe argues that since the Nevada Supreme Court's ruling restricts the Tribe's right to exclude non-members, that ruling improperly recognized an easement by implication across the Tribe's reservation. Yet, the Nevada Supreme Court neither addressed the question of whether an easement exists, nor recognized such an easement. The Nevada Supreme Court merely recognized

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[16] What the Tribe is truly seeking here is the addition of the United States as a party so the United States can remove this action to federal court and then attempt to have the action dismissed. That was the Tribe's tactic in Humboldt I. This legal dance is played out throughout the West, and in this case it has completely frustrated the Respondent Court's power to protect decreed water rights.

[17] The reason the United States was named in Humboldt I and II was that as a trustee of water rights, the United States is obligated to pay assessment fees charged against the subject water rights if the Tribe does not pay the fees. This specific act of omission—failure to pay the fees—made the United States an appropriate party in Humboldt I and II.

the Tribe cannot accept the benefit of its water rights without accepting the burdens attached to those rights. As stated above, one of the burdens attached, part and parcel to those rights, is the right of state officials to regulate state-created water rights.

The Nevada Supreme Court's ruling is consistent with this Court's precedent involving congressional abrogation of a tribe's right to exclude non-members. The significance of these precedents is that a tribe's right to exclude others can be abrogated by a congressional act that does not expressly mention the abrogation if the tribal right is irrational in light of other legislation.

In *Montana v. United States*, 450 U.S. 544 (1981), the United States Supreme Court addressed the question of whether Congress abrogated a tribe's right to exclude others when it adopted the General Allotment Act of 1877. The Court reasoned, "it defies common sense to suppose Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." *Id.* at 560 n.9. In *South Dakota v. Bourland*, 508 U.S. 679, 688 (1993), the Court held that when Congress passed an act to construct a dam and recreational lake on tribal land, Congress abrogated the Tribe's right to exclusive use of those lands. *See also Brendale*, 492 U.S. at 437 (Tribe's right to zone impliedly abrogated if it "is equally improbable that Congress envisioned that the Tribe would retain" such a right.).

Likewise, when Congress directed that water rights be purchased for the Tribe, it is irrational to conclude that Congress intended the Tribe to be able to exclude the Water Commissioners who had historically regulated those waters. The very purpose of the federal government's purchase of water rights was so the Tribe could prosper. Prosperity depends upon the orderly distribution of water. The exclusion of Water Commissioners from the reservation, and the restriction on the Water

Commissioner's right to cross the reservation, undercut Congress's intent to provide the Tribe with a valuable, dependable water source. Accordingly, the only rational conclusion is that when the United States purchased decreed water rights for the Tribe that were burdened by the obligation of state regulation and the decree, the Tribe's right to exclude the Water Commissioners from its reservation was abrogated.

**A. Application of NEV. REV. STAT. § 533.305(3).**

The Tribe argues NEV. REV. STAT. § 533.305 (1999) does not authorize the state to travel on and across the Tribe's reservation. NEV. REV. STAT. § 533.305 (1999) provides the Water Commissioners with the right of ingress and egress upon and across any public, private, or corporate land. However, NEV. REV. STAT. § 533.305 (1999) is not necessary for the State to have the authority to regulate the Tribe's water rights. The Humboldt Decree enjoins the Tribe, as a successor-in-interest to decreed water right owners, from opening, closing, or otherwise meddling with the headgates that divert its water from the South Fork of the Humboldt River without the permission of the Water Commissioners. P. App. at D-8 to D-9. Implicit in this injunction is the necessary power Water Commissioners have to travel to a headgate to manipulate it, or monitor it, if Water Commissioners have not given any one else permission to manipulate the headgate. Accordingly, every person who owns decreed water rights must let Water Commissioners have access to their headgates. Since this right of access for the Water Commissioners comes from the Humboldt Decree, NEV. REV. STAT. § 533.305 (1999) is not necessary.[18]

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[18] The enactment of NEV. REV. STAT. § 533.305 (1999) by the Nevada Legislature provided Water Commissioners with authority to travel across land to regulate the Humboldt River, even if the land in question is *not* owned by a person who is already enjoined by the Humboldt Decree.

Assuming the Water Commissioners are not authorized by the decree to travel upon and across the reservation, the Tribe's argument that NEV. REV. STAT. § 533.305 (1999) should not apply to the Tribe because it does not mention *reservation lands* should be disregarded. NEV. REV. STAT. § 533.305 (1999) places upon the State Engineer and Water Commissioners the responsibility to regulate headgates and diversions for all decreed water rights to assure each water right owner receives the appropriate distribution of water in accordance with a water right decree. The authority this statute provides must be determined by considering the purpose and spirit of the law, *State v. Webster*, 726 P.2d 831, 833 (Nev. 1986); *see Escalle v. Mark*, 183 P. 387, 388 (Nev. 1919) (interpretation should look to evils to be remedied by statute and the reason or spirit of statute), and the consequence and effect of a particular interpretation. *Nevada Tax Comm'n v. Bernhard*, 683 P.2d 21, 23 (Nev. 1984); *Alper v. State ex rel. Dep't of Highways*, 621 P.2d 492, 495 (Nev. 1980).

If NEV. REV. STAT. § 533.305 (1999) is not interpreted to authorize Water Commissioners to cross any water user's land to reach land where a point of diversion is located, it would be impossible for Water Commissioners to effectively enforce a water right decree. Unless NEV. REV. STAT. § 533.305 (1999) is interpreted to provide this authority, the Water Commissioners will not be able to exercise state control of the water resources that are subject to a decree, protect all water users, or secure a just distribution of water rights. Accordingly, the intent of the Legislature when it adopted NEV. REV. STAT. § 533.305 (1999) was to allow the Water Commissioners to travel across any water user's property to regulate the stream system. *See Checker, Inc. v. Public Serv. Comm'n*, 446 P.2d 981, 985 (Nev. 1968) (Everything to carry out power implied; express power includes any incidental reasonably necessary power).[19]

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[19] The Tribe's semantic argument regarding NEV. REV. STAT. § 533.305 (1999) should be disregarded. The Tribe claims that public lands

Also, the Tribe's argument regarding NEV. REV. STAT. § 533.305 (1999) is contrary to the State Engineer's construction of NEV. REV. STAT. § 533.305 (1999) and historical practice. The State Engineer is impliedly clothed with the power to construe NEV. REV. STAT. § 533.305 (1999), because NEV. REV. STAT. § 533.305 (1999) charges the State Engineer with administering a particular act. *SIIS v. Snyder*, 865 P.2d 1168, 1171 (Nev. 1993). The State Engineer concluded that NEV. REV. STAT. § 533.305 (1999) provides the Water Commissioners with the ability to enter upon any land in the State of Nevada when the purpose of such entry is to regulate a stream system according to a decree.[20] Finally, historically the practice of Water Commissioners has been to travel upon any land, regardless of whether land is owned by a water right owner, if such access is necessary to reach a diversion device from a stream system subject to a decree.

### B. Federal Regulations Do Not Bar State Access Upon And Across Reservation.

The Tribe asserts a federal regulation prohibits the application of state law on a reservation. This regulation is inapplicable because before the reservation was created, the State's right to access encumbered the water rights acquired by the Tribe. Just as its predecessors-in-interest received their decreed water rights subject to state law and the

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do not include Indian reservations; therefore NEV. REV. STAT. § 533.305 (1999) does not apply to Indian reservations. However, the definitions cited to by the Tribe are contained in NEV. REV. STAT. chapters 321 and 408, not the water code. By their own limiting language, those definitions are only applicable in the chapters in which they are located. NEV. REV. STAT. §§ 321.5963, 321.655, 408.020 (1999).

[20] The State Engineer reasoned that the point of diversion of a water right, oftentimes, is not located on the property that is the place of use of that water right. Also, the property where the point of diversion is located is often owned by someone other that the owner of the water right and may be owned by someone other than the owner of the property where the place of use is located. To effectively regulate a water right, therefore, it is often necessary to travel onto property which may not be owned by a decreed water right holder.

Humboldt Decree, so too did the Tribe receive its water rights subject to state law and the Humboldt Decree. *Montana v. United States*, 450 U.S. 544, 552 (1981) (When state retains ownership of the beds and banks of a navigable river that runs through a reservation, state retains a right of ingress and egress on the navigable waterway, defeating a tribe's claim of exclusive control over the waterway); *Faxon v. Lallie Civil Township*, 163 N.W. 531 (N.D. 1917) (North Dakota Supreme Court found state's right to construct section line roads vested prior to the setting aside of land as Indian reservation, making set aside of reservation lands subject to state's right to construct road).

Further, in certain circumstances, a Tribe's right to exclude has been abrogated in favor of a state's right to regulate water resources on a reservation pursuant to state law. *See United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984); *Coleville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981); *In Re Big Horn River System*, 835 P.2d 273 (Wy. 1992). To determine whether such a right of state regulation exists, a court must weigh whether the United States has preempted the field of regulation at issue, whether tribal sovereignty will be significantly impaired, and the state's interest in regulation. *Id.*

Here Congress has historically deferred to state control of water resources. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935). With respect to tribal sovereignty, the past fifty years of State regulation on the reservation indicates that such regulation does not impair tribal sovereignty. The State's interest in regulation in this case cannot be overstated because if the Tribe prohibits the State from regulating its water rights, downstream users cannot be protected. Further, the water rights at issue here were created and recognized under state law, not as Indian reserved water rights. *Big Horn*, 835 P.2d at 283 (State allowed to administer Indian and non-Indian *state* water rights on reservation, not *reserved* water rights). Accordingly, it is perfectly proper to conclude Congress abrogated the Tribe's right to exclude Water Commissioners

from traveling upon and across tribal land to regulate decreed water rights.

## CONCLUSION

For three full irrigation seasons, the Tribe prohibited the State from regulating its water rights and the private water rights held on the Gund Ranch. The Tribe has taken an irrational stance that is frustrating the entire administration of the Humboldt River. The Tribe's claim to a right to receive state water without public regulation or control is subversive to Nevada's sovereignty. *Bergman*, 241 F. at 893. This stance culminated in the Tribe's egregious arrest of an officer of the Respondent Court.

This stalemate has to come to an end. Water is too important to the agricultural enterprises downstream from the reservation. *See Czipott v. Fliegh*, 489 P.2d 681 (Nev. 1971) (holding that when water supply is threatened, injury is presumed). Justice must intervene to stop the threat presented by the Tribe. The Nevada Supreme Court properly applied principles of state and federal law to resolve this dispute. Accordingly, the Respondents respectfully request this Court to deny the Tribe's petition for a writ of certiorari.

Respectfully submitted,

FRANKIE SUE DEL PAPA
Attorney General of the
State of Nevada
PAUL G. TAGGART
(*Counsel of Record*)
Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1232

January 2001

*Counsel for Respondents and Real Parties In Interest*

# APPENDICES

## APPENDIX A

RESOLUTION OF THE GOVERNING BODY
OF THE
SOUTH FORK BAND INDIAN RESERVATION

Resolution No. 98-SF-12

WHEREAS, this is a constituent Band known as the South Fork Band Council defined by the Indian Reorganization Act of June 18, 1934, as amended, and operates and functions in accordance with the Constitution of the Te-Moak Tribe of Western Shoshone Indians of Nevada, approved on August 26, 1982, and

WHEREAS, the South Fork Band Council was purchased in 1937 under the aspects of the Indian Reorganization Act (IRA) of 1934.

WHEREAS, the Western Shoshone Indians of the Te-Moak Tribe have a vested water right to water that passes through their aboriginal territories described in the Ruby Valley Treaty of 1863,

WHEREAS, South Fork Reservation has an additional water rights through the IRA purchase of lands for the South Fork Reservation and decisions through court such as the quoting of Winters decisions in the Walker River Irrigation District vs. U.S. Government which pertains to Executive Order Reservations.

WHEREAS, the South Fork Band Council, by this resolution, is requesting BIA, Eastern Nevada Agency, to protect the reservations inherent water rights to all the waters, both above and underground, through their legal counsel if need be.

BE IT RESOLVED, that the South Fork Reservation is requesting the BIA, Eastern Nevada Superintendent Steve Tibbetts to notify the State of Nevada Water Commissioner and their representatives that they

are not to be allowed to regular [sic] any of the up-stream turnouts that supply the South Fork Reservation with irrigation waters.

NOW THEREFORE BE IT RESOLVED, that the South Fork Band Council is directing Superintendent Tibbetts to not pay for water that is our inherent right through any monies that should be allocated to South Fork for their use.

C-E-R-T-I-F-I-C-A-T-I-O-N

I, the undersigned as Chairman of the South Fork Band Council do hereby certify that the South Fork Band Council is composed of seven (7) members of whom 7 constituting a quorum were present at a meeting duly held on the 8th day of March, 1998, and that the foregoing resolution was duly adopted at such meeting by a vote of: 7 for, 0 against, 0 abstained, pursuant to: Article 4, Section 12(a) and (b) and Section 3 of the Constitution of the Te-Moak Tribe of Western Shoshone Indians of Nevada.

| | |
|---|---|
| ATTEST: | /s/ Marvin McDade |
| /s/ Alice Tybo | Marvin McDade: Chairman |
| Recording Secretary | South Fork Band Concil |

## APPENDIX B

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

1145

ORDER

South Fork Band Council of the
Te-Moak Tribe of Western
Shoshone Indians of Nevada
P.O. Box B-13
Lee, Nevada 89829
Certified Mail No. P 444 504 416

WHEREAS, the records of the Office of the State Engineer establish that the Te-Moak Tribe of the Western Shoshone Indians of Nevada are the successors-in-interest to water rights originally decreed to A.J. Dewar, Clark Drown, A.M. Griswold, J.J. Hylton and P.J. Ogilvie under the terms of the Bartlett and Edwards decrees issued by the Sixth Judicial District Court of the State of Nevada, such decrees are also known as the Humboldt Decree;

WHEREAS, the State Engineer and the Water Commissioners of the Sixth Judicial District Court are statutorily entrusted with the responsibility for administering the terms of the Humboldt Decree pursuant to NRS 533.220;

WHEREAS, included among the administrative duties of the State Engineer and the Water Commissioners of the Sixth Judicial District Court is the responsibility for entering upon public, private or corporate lands at all times in the exercise of their duties under NRS 533.305(3);

WHEREAS, also included among the administrative duties of the State Engineer is the right to assess holders of decreed water rights, under NRS 533.285, their proportionate share of the costs associated with the

distribution of water to them, such assessment not for the use of the water but, instead, intended to offset the expense and cost of distributing the water by the Water Commissioners of the Sixth Judicial District Court. NRS 533.295.

WHEREAS, on March 8, 1998, the South Fork Band Council of the Te-Moak Tribe of Western Shoshone Indians of Nevada resolved that the Water Commissioners of the Sixth Judicial District Court are not to be allowed to regulate any of the upstream turnouts that supply the South Fork Reservation with irrigation water and that the Council is not to pay for water with money allocated to the South Fork Band for its use.

WHEREAS, since March 8, 1998, the Water Commissioners of the Sixth Judicial District Court have not been permitted access on the South Fork Reservation and the Tribe has failed to pay its most recent assessment for water distribution to the South Fork Reservation.

NOW THEREFORE, YOU ARE HEREBY ORDERED within fourteen (14) days of the date of this Order, to rescind the March 8, 1998, Resolution of the South Fork Band Council or otherwise signal an intent to permit the Water Commissioners of the Sixth Judicial District Court access to regulate the upstream turnouts that supply the South Fork Reservation with irrigation water and to pay the assessments intended to offset the expense and cost of distributing water to the South Fork Reservation by the Water Commissioners of the District Court.

/s/ R. Michael Turnipseed P.E.

R. Michael Turnipseed, P.E.

State Engineer

Dated at Carson City, Nevada this

22nd Day of May, 1998.

## APPENDIX C

South Fork Indian Reservation
South Fork Band Council
Box B-13 • Lee, Nevada 89829
(702) 744-4273 • Fax (702) 744-4523

June 2, 1998

R. Michael Turnipseed, P.E.
State Engineer
Division of Water Resources
123 W. Nye Lane
Carson City, NV 89706-0896

Dear Mr. Turnipseed:

I am in receipt of your most recent letter referring to our March 8, 1998, resolution closing South Fork Reservation to State of Nevada water commissioners. I offer the following response.

NRS 533.305-3. Administration duties does not include Indian Reservations only public, private, or corporate land. Unless you can some way prove that South Fork Reservation is not a legal Indian Reservation that this approach is null.

NRS 533.285 also does not mention Indian Reservation. This approach is also null.

You as a state employee, not a federal employee, do not have the authority to order the South Fork Band Council to do anything. South Fork Reservation is not under Public Law 280, but is an Indian Organization created under Federal Statue. Even if Supt. Tibbetts sides with you in this matter, the SFBC does not and we will not rescind the resolution, and stand on the Winters Doctrine to protect our water rights as a sovereign nation, we are not subject to State control or laws. We also have a vested right to use the waters under the Ruby Valley Treaty of 1863.

Sincerely,

/s/ Marvin McDade

Marvin McDade

Chairman

Enclosures 3

cc: Superintendent E.N.A. BIA, Steve Tibbetts
Area Director, Wayne Nordwall
Senator, Dean Rhoads
Nevada Attorney General Frankie Sue Del Pappa
Assemblyman John Carpenter
Ass't. Secretary of Interior Bruce Babbit
U.S. Attornies

## APPENDIX D

South Fork Indian Reservation
South Fork Band Council
Box B-13 • Lee, Nevada 89829
(702) 744-4273 • Fax (702) 744-4523

RESOLUTION OF THE GOVERNING BODY
OF THE
SOUTH FORK BAND INDIAN RESERVATION

RESOLUTION NO. 98-SF-36

BE IT RESOLVED BY THE SOUTH FORK BAND COUNCIL:

WHEREAS, this organization is an Indian organization known as the South Fork Band Band Council, as defined by the Indian Reorganization Act of June 18, 1934, as amended, and operates and functions in accordance with the Constitution of the Te-Moak Tribe of Western Shoshone Indians of Nevada, and

WHEREAS, the South Fork Band Council has since the Reservation, was established, always regulated the water turnouts on the South Fork Reservation, and

WHEREAS, the South Fork Reservation has a ditch rider employed to regulate the water for our assignees, and

WHEREAS, the State of Nevada Water Master does not need to send employees to South Fork to duplicate and assess a fee for these services already provided by the South Fork Band Council, and

WHEREAS, the South Fork Band Council as a sovereign government is not subject to assessment taxes or other state regulations or laws. South Fork Band Council has an aboriginal, vested and legal right to the waters being an Indian Reservation held in trust by the United States Government.

NOW THEREFORE BE IT RESOLVED, that the South Fork

Band Council will always regulate the waters on this Reservation for the benefit of our people and the State of Nevada Water Master and employees must cease attempts to assess fees and regulate South Fork waters.

C-E-R-T-I-F-I-C-A-T-I-O-N

I, the undersigned as Chairman of the South Fork Band Council do hereby certify that the South Fork Band Council is composed of (7) seven members of who (6) six constituting a quorum were present at a meeting duly held on the 11th day of August, 1998, and that the foregoing resolution was duly adopted at such meeting by a vote of 6 for, 0 against, 0 abstained, pursuant to Article 4, Section 12(a) and (b) and Section 3 of the Constitution of the Te-Moak Tribe of Western Shoshone Indians of Nevada.

/s/ Marvin McDade

Marvin McDade, Chairman

South Fork Band Council

ATTEST:

_____

Recording Secretary

**APPENDIX E**

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RENO, NEVADA

ENGINEER, STATE OF NEVADA,

Plaintiffs, CV-N-98-679-ECR (RAM)

vs. MINUTES OF COURT

SOUTH FORK BAND OF THE TE-MOAK, et al., Date: August 23, 1999

Defendants.

_____/

PRESENT: EDWARD C. REED, JR., U. S. DISTRICT JUDGE

Deputy Clerk: COLLEEN LARSEN Reporter CATHY WORKEN

Counsel for Plaintiff(s) DAVID CREEKMAN; PAUL TAGGART

Counsel for Defendant(s) RAYMOND RODRIGUEZ; ROGER MARTELLA

**MINUTES OF CONTINUED HEARING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION (#42):**

At 4:15 P. M. Court convenes; defense counsel Rodriguez and Martella are present on the telephone.

The Court makes its findings for the record.

**IT IS HEREBY ORDERED** that plaintiff's motion for preliminary injunction (#42) against the "Tribe", is hereby GRANTED.

**IT IS FURTHER ORDERED** that plaintiff's motion for preliminary injunction (#42), as against the Untied States, is DENIED.

**IT IS FURTHER ORDERED** that the defendants South Fork Band of the Te-Moak Band of the Shoshones, and Marvin McDade in his capacity as Chair of the South Fork Band Council, and their officers, agents, servants, employees and attorneys, and those persons in active concert with any of them, and each of them, who receive actual notice of this order by personal service or otherwise, are hereby preliminarily enjoined and restrained pending the further proceedings in this case from prohibiting the State Engineer and the Water Commissioners under the Humboldt River Decree from entering the South Fork Indian Reservation to regulate the Humboldt River pursuant to the provisions of the Humboldt Decree.

**IT IS FURTHER ORDERED** that, in that the State in essence is the movant in this case, no bond is required for issuance of the preliminary injunction.

LANCE S. WILSON, CLERK

/s/ Colleen Larsen

By COLLEEN LARSEN

Deputy

**APPENDIX F**

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BEFORE THE HONORABLE EDWARD C. REED, JR., DISTRICT JUDGE

—OOO—

| | | |
|---|---|---|
| ENGINEER, STATE OF NEVADA, | ) | NO. CV-N-98- |
| PLAINTIFF, | ) | 679-ECR (RAM) |
| -VS- | ) | AUGUST 23, |
| SOUTH FORK BAND OF THE | ) | 1999 |
| TE-MOAK, ET AL., | ) | RENO, |
| DEFENDANTS. | ) | NEVADA |
| | ) | VOLUME III |

HEARING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

APPEARANCES:

| | |
|---|---|
| FOR THE PLAINTIFF: | PAUL TAGGART,<br>DAVID CREEKMAN<br>WAYNE HOWLE,<br>DEPUTY ATTORNEY<br>GENERALS<br>CARSON CITY, NEVADA |
| FOR THE DEFENDANT:<br>SOUTH FORK BAND | RAYMOND RODRIGUEZ,<br>ESQUIRE<br>CARSON CITY, NEVADA |
| FOR THE DEFENDANT:<br>UNITED STATES | ROGER MARTELLA<br>PATRICK BARRY,<br>DEPARTMENT OF JUSTICE<br>WASHINGTON, D.C. |

REPORTED BY: CATHY M. WORKEN, CCR, RPR
OFFICIAL COURT REPORTER
400 SOUTH VIRGINIA STREET
RENO, NEVADA 89501
(775) 324-6777

COMPUTER-ASSISTED TRANSCRIPTION

* * *

Pages 356-359 Omitted

* * *

THE CREDIBLE EVIDENCE IS THAT THE RIVER IS FULLY APPROPRIATED.

THIS MEANS THAT IF ANYONE DIVERTS MORE THAN HE, SHE OR IT IS ENTITLED TO RECEIVE UNDER THE DECREE, WATER WILL BE TAKEN IN VIOLATION OF THE RIGHTS OF ANOTHER DECREE HOLDER.

THERE ARE CERTAIN PERMITS WHICH HAVE BEEN ISSUED BY THE STATE ENGINEER UNDER THE NEVADA WATER LAW WHICH ARE IN THE DECREE, AND THERE ARE CERTAIN OTHER RIGHTS WHICH ARE NOT IN THE DECREE, AS I UNDERSTAND IT, THESE ARE PERMITTED RIGHTS AND THEY ARE ALL BEING ADMINISTERED BY THE STATE ENGINEER, WHETHER THEY ARE VESTED RIGHTS OR PERMITTED RIGHTS MENTIONED IN THE DECREE, OR PERMITTED RIGHTS WHICH MAY HAVE BEEN PERFECTED AFTER THE DECREE WAS ENTERED.

ANY DIVERSION FROM THE RIVER CARRIES SOME LOSS, EVEN THOUGH THERE ARE SITUATIONS WHERE A GOOD PERCENTAGE OF THE WATER DIVERTED WILL RETURN TO THE RIVER, NONETHELESS, ANY DIVERSION MUST BE DEEMED TO

CAUSE SOME LOSS TO THE FLOW OF THE RIVER.

THERE ARE NO RECORDERS OR MEASURING DEVICES FOR DIVERSIONS WHICH ARE MADE ON THE RESERVATION.

THE STATE ENGINEER AND HIS DEPUTIES AND THE WATER COMMISSIONERS CARRY SUCH DEVICES WITH THEM FOR USE WHEN THEY REGULATE THE HEADGATES FOR THE VARIOUS DIVERSIONS UNDER THE DECREE.

NO EFFORT IS MADE BY THE TRIBE'S DITCH RIDER OR THE SUPERVISING TRIBAL OFFICIALS TO MEASURE THE WATER BEING DIVERTED FROM THE RIVER AT THE HEADGATES ON THE RESERVATION, NOR DO THEY KNOW WHAT THE DECREE PERMITS THEM TO DIVERT OR ENDEAVOR TO LIMIT THEIR DIVERSIONS IN ACCORDANCE WITH THEIR DECREED RIGHTS.

THE TESTIMONY OF THE TRIBAL CHAIR IS THAT THE TRIBE DIVERTS ENOUGH WATER IN THE IRRIGATION SEASON TO RUN THROUGH THE RESERVATION AND SHUTS THE WATER OFF WHEN THEY ARE HAYING.

THE STATE ENGINEER HAS NOT BEEN ALLOWED ON THE RESERVATION FOR THE PAST TWO YEARS, AND NO ONE KNOWS WHAT THE DIVERSIONS ON THE RESERVATION HAVE BEEN DURING THAT PERIOD OF TIME OR AT PRESENT TIME, WHETHER THEY ARE IN EXCESS OF THE DECREED RIGHTS.

ONE OF THE TESTS OF WHETHER A PRELIMINARY INJUNCTION SHOULD BE ISSUED IS WHETHER THE PETITIONER CAN SHOW A POSSIBILITY OR THREAT OF IRREPARABLE HARM.

CLEARLY PETITIONER HAS MET THIS BURDEN.

THE EVIDENCE AS TO THE RIVER FLOWS AND THE DECREED RIGHTS AT VARIOUS TIMES OF THE YEAR SHOW THAT THE DOWNSTREAM USERS BELOW

THE RESERVATION ARE UNDER A THREAT OF IRREPARABLE INJURY, AND PETITIONER HAS SHOWN BY A PREPONDERANCE OF THE EVIDENCE THAT THE DOWNSTREAM USERS MAY SUFFER POSSIBLE IRREPARABLE INJURY IF THE INJUNCTION IS NOT ENTERED.

I USE POSSIBLE IRREPARABLE INJURY INTERCHANGEABLE WITH THREAT OF IRREPARABLE INJURY.

PROOF OF THIS FACTOR DOES NOT REQUIRE PETITIONER TO SHOW THAT THERE IS ACTUAL INJURY OR HARM WHICH HAS BEEN SUFFERED BY ANYONE, ALL THAT NEED BE SHOWN IS THAT POSSIBLE IRREPARABLE INJURY MAY BE SUFFERED OR THAT THERE IS A THREAT OF IRREPARABLE INJURY.

WATER RIGHTS ARE CONSIDERED IN THE SAME MANNER AS REAL PROPERTY FOR PURPOSES OF DETERMINING IF THERE EXISTS THE POSSIBILITY OF IRREPARABLE INJURY.

IF WATER IS DIVERTED IN DEROGATION OF DECREED OR PERMITTED WATER RIGHTS, IT IS THE SAME AS IF REAL PROPERTY HAS BEEN TAKEN.

THERE IS IRREPARABLE INJURY IF THAT OCCURS FOR THESE PURPOSES.

IN ADDITION, THE CREDIBLE EVIDENCE IS THAT IF THERE IS A DIVERSION OF WATER ON THE RESERVATION IN EXCESS OF THE DECREED RIGHTS, WATER RIGHTS OF DOWNSTREAM USERS WILL BE INTERFERED WITH AND VIOLATED DURING ANY TIME OF THE YEAR.

THE EVIDENCE ALSO SHOWS THAT WATER RIGHTS DOWNSTREAM ARE NOT BEING SATISFIED AT ALL TIMES.

AT THE DAY OF OUR HEARING, THE DOWNSTREAM DEMAND UNDER THE DECREE WAS

FAR IN EXCESS OF THE ACTUAL FLOW OF THE RIVER.

BUT IT IS TRUE THAT AT ANY TIME IN THE YEAR IF THE TRIBE WERE TO DIVERT IN EXCESS OF THEIR DECREED RIGHTS THEN THERE WOULD BE WATER RIGHTS WHICH WOULD BE VIOLATED DOWNSTREAM FROM THEM.

THERE MAY BE FLOOD YEARS WHEN THE AMOUNT OF WATER RIGHTS IN THE RIVER -- LET ME START THAT OVER.

THERE MAY BE FLOOD YEARS WHEN THE AMOUNT OF WATER IN THE RIVER WOULD EXCEED THE DECREED AND PERMITTED RIGHTS, BUT THOSE ARE FEW AND FAR BETWEEN ACCORDING TO THE EVIDENCE HERE.

IN ALMOST EVERY YEAR THE FLOW OF THE RIVER IS FULLY REQUIRED TO MEET THOSE RIGHTS AND IS UNABLE TO FULLY MEET ALL RIGHTS.

THE ISSUE OF WHETHER DOWNSTREAM RIGHTS CAN BE MET IS A MATTER OF THE DAY-TO-DAY FLOW OF THE RIVER, NOT THE ANNUAL FLOWS, THE TYPICAL FLOWS, THE SEASONAL FLOWS, OR THE FLOWS ON ONE PARTICULAR DAY, ALTHOUGH THE TOTAL WATER WHICH MAY BE DELIVERED DOES GENERALLY HAVE A SEASONAL CAP UNDER THE DECREE AND THE PERMITS.

THE FLOWS VARY GREATLY DURING THE YEAR DEPENDING ON SUCH THINGS AS THE TIMING AND AMOUNT OF PRECIPITATION, THE SNOWPACK, THE RATE OF SNOW MELT, AND SIMILAR FACTORS.

NO ONE CAN TELL WHEN THE RUN-OFF WILL COME.

THE FLOW VARIES ON A DAILY BASIS.

THE CRITICAL QUESTION IS HOW MUCH WATER IS FLOWING IN THE RIVER ON A GIVEN DAY AND WHO HAS WHAT RIGHTS TO THAT FLOW.

THE FACT THAT IN A PARTICULAR YEAR THE

TOTAL

* * *

Pages 364-372 Omitted

* * *

LET US THEN DEAL WITH TWO OTHER IMPORTANT ASPECTS OF THE MOTION.

FIRST, THE GUNN RANCH MOTION.

AND SEPARATELY THE POSITION OF THE UNITED STATES.

THERE'S SOME SUGGESTION IN THE PRESENTATION OF THE PRELIMINARY INJUNCTION MOTION THAT AN INJUNCTION IS SOUGHT TO REQUIRE THE TRIBE TO PERMIT THE STATE ENGINEER AND WATER COMMISSIONERS TO CROSS THE RESERVATION TO REACH THE NEIGHBORING GUNN RANCH TO REGULATE THE HEADGATES ON THAT RANCH.

HOWEVER, THE MOTION APPEARS TO SEEK ONLY ACCESS -- THE MOTION ITSELF APPEARS TO SEEK ONLY ACCESS TO THE RESERVATION TO REGULATE DECREED WATER RIGHTS BELONGING TO THE RESERVATION.

FURTHERMORE, WE DO NOT FIND ANY IMPLICATION IN THE STATUTE WHICH WOULD GIVE AUTHORITY TO THE STATE ENGINEER TO CROSS ONE PERSON'S PRIVATE PROPERTY TO REACH THE PROPERTY OF A NEIGHBOR TO REGULATE THE NEIGHBOR'S HEADGATES.

THE ISSUE AS IT IS PRESENTED IN THIS CASE APPEARS TO INVOLVE A REAL PROPERTY QUESTION OF WHETHER THERE IS AN EASEMENT TO CROSS THE RESERVATION TO REACH THE GUNN RANCH.

THIS QUESTION IS OUTSIDE THE ISSUES FRAMED FOR THIS MOTION FOR PRELIMINARY INJUNCTION.

I MIGHT ALSO COMMENT THAT SINCE WE ARE GOING TO ORDER THE TRIBE TO PERMIT THE STATE ENGINEER TO COME ON THE

* * *

Pages 374-376 Omitted

* * *

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE PROCEEDINGS HELD IN THE ABOVE-ENTITLED ACTION.

9-20-99
DATE

/s/ Cathy M. Worken
CATHY M. WORKEN, CCR, RPR
OFFICIAL COURT REPORTER
400 SOUTH VIRGINIA STREET
RENO, NEVADA 89501
(775) 324-6777

## APPENDIX G

## AFFIDAVIT OF WAYNE TESTOLIN

STATE OF NEVADA )
) ss.
COUNTY OF ELKO )

I, Wayne Testolin, do hereby swear under penalty of perjury that the assertions of this affidavit are true:

1. I am currently the Supervising Water Commissioner for the Humboldt Decree and have held this position since 1989.

2. In my capacity as Supervising Water Commissioner, I serve as an officer of the Sixth Judicial District Court of the State of Nevada that entered the Humboldt Decree.

3. As an officer of the court, I supervise the Water Commissioners of the Sixth Judicial District Court in their administration of the Humboldt Decree.

4. One of the duties of the Water Commissioners is to regulate the Humboldt stream system to assure that the water rights are served pursuant to the Humboldt Decree.

5. In order to regulate the Humboldt stream system, it is necessary for Water Commissioners to travel upon private, public, and corporate lands to reach the headgates of the stream system.

6. The Water Commissioners' right of access to such headgates is provided in NRS 533.305(3).

7. On September 13, 1999, two other Water Commissioners, Roger Ghrist and Kirk Owsley, and I went to the South Fork of the Humboldt River to regulate the water there at about 10:30 a.m.

8. We reached the South Fork of the river and found that the L.D.S. Church Ranch had taken the tarp, and there was water backed into their ditch with approximately

4 c.f.s. even though the irrigation season was over as of August 15th.

9. After regulation of the Church Ranch, we continued our way upstream through the South Fork Reservation to regulate the Humboldt stream system in compliance with the Humboldt Decree. We intended to regulate turnouts that serve the tribal water rights.

10. Part of the tribal water rights are served by diversions that are located on private land that can only be reached, reasonably, by crossing the reservation on various roads to get to each diversion. These diversions include, but are not limited to, the Mountain Ditch diversion, the Dewar Ditch diversion, the Magneson headgate in Long Canyon, the Woods Ditch diversion, the Pearl Creek and Tucker Ditch diversions, and the Rattlesnake Creek diversion.

11. The diversions on the private land also include diversions that serve private water rights.

12. It is necessary to regulate these diversions that are located on private land in order to properly regulate the Tribe's Humboldt Decree water rights, as well as the decreed water rights that are held by the owners of that private land.

13. Coming around the corner of Lee Creek, Harley Reynolds, the Tribe's ditch rider, and an Indian Police Officer were talking in the road. The officer pulled over and we went by. He followed us as we were going slow so as not to get a speeding ticket.

14. We were heading upstream to Long Canyon, a branch of the South Fork of the Humboldt River. In doing so, we had to go on the Gund property. Under State law, we have authority to do so, as I believed was confirmed by the injunction issued by the Federal Court.

15. When we crossed the Gund property and traveled up the road, we heard sirens. We turned around and the Tribal Police Officer was coming up the road to Gund's property. We stopped and waited for him, as we were the only vehicle he was after. When he got out of the

car, Marvin McDade was with him. He said we didn't have the right to be where we were. At this point we were on private property. McDade kept saying that we needed a helicopter to go on Gund's property, as that was what his attorney told him, and we needed to call the Tribe every time we came out. He called me a lot of names, and at one time, I thought he was going to hit me, as he was pounding on the truck with his fist.

16. I mentioned the fact that Judge Reed had issued an order allowing us access to the reservation, and State law states we could go on the Gund Ranch.

17. At that time, he made us turn around and was going to escort us back to the tribal office where I was going to get him a copy of Judge Reed's Injunction.

18. Right away he started to call me names and told me that I didn't have the right to go across Indian lands to get to the Gund ranch. McDade kept calling me "boy" in a racial slang context. Then he ordered the Tribal Officer to "arrest me."

19. The Tribal Officer put handcuffs on me and tried to put my arms behind my back at which time I asked him not to do so as I had pulled muscles in my left arm. Then he handcuffed me in front and charged me with trespass but did not read me my Miranda rights. He then hauled me off the reservation and turned me loose at the main road going to Jiggs.

20. Roger Ghrist and Kirk Owsley picked me up at that point.

/s/ Wayne Testolin
WAYNE TESTOLIN

SIGNED AND SWORN to before me
this 5 day of November, 1999,
by WAYNE TESTOLIN.

/s/ June C. Letarte
NOTARY PUBLIC
[SEAL]

## APPENDIX H

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

1154

ORDER

| | |
|---|---|
| South Fork Band Council of the | United States of America |
| Te-Moak Tribe of Western | Bureau of Indian Affairs |
| Shoshone Indians of Nevada | 400 N. Fifth St., 12th Floor |
| P.O. Box B-13 | 2 Arizona Center |
| Lee, Nevada 89829 | Phoenix, Arizona 85004 |
| Cert. Mail No. P 444 469 382 | Cert. Mail No. P 444 469 383 |

**WHEREAS**, the records of the Office of the State Engineer establish that the Te-Moak Tribe of the Western Shoshone Indians of Nevada (the "Tribe) are the successors-in-interest to water rights originally decreed to A.J. Dewar, Clark Drown, A.M. Griswold, J.J. Hylton and P.J. Ogilvie under the terms of the Bartlett and Edwards decrees issued by the Sixth Judicial District Court of the State of Nevada, such decrees are also known as the Humboldt Decree;

**WHEREAS**, the State Engineer and the Water Commissioners of the Sixth Judicial District Court are statutorily entrusted with the responsibility for administering the terms of the Humboldt Decree pursuant to NRS 533.220;

**WHEREAS**, included among the administrative duties of the State Engineer and the Water Commissioners of the Sixth Judicial District Court is the responsibility for entering upon public, private or corporate lands at all times in the exercise of their duties under NRS 533.305(3);

**WHEREAS**, on July 2, 1999, the Honorable Edward Reed, United States District Judge, District of Nevada, ruled that the Tribe has waived its sovereign immunity with respect to the Humboldt Decree.

**WHEREAS**, on August 24, 1999, the Honorable Edward Reed, United States District Judge, District of Nevada, issued a preliminary injunction, enjoining the Tribe from prohibiting Water Commissioners of the Sixth Judicial District Court from entering the reservation to regulate the Humboldt River pursuant to the Humboldt Decree.

**WHEREAS**, on September 13, 1999, a Water Commissioner for the Sixth Judicial District Court entered the reservation to regulate the Humboldt River pursuant to the Humboldt Decree.

**WHEREAS**, the Water Commissioner entered the reservation to regulate headgates on the reservation and on land which can only be reasonably accessed by traveling across the reservation.

**WHEREAS**, when the Water Commissioner traveled on private land to regulate the river, such land being only reasonably accessible by traveling through the reservation, the Water Commissioner was stopped and questioned by the Tribal Chairman and a Tribal Police Officer.

**WHEREAS**, the Water Commissioner was ordered to travel off the private land, onto the reservation, and when he entered the reservation, said Commissioner was arrested by the Tribal Police Officer.

**WHEREAS**, the Water Commissioner was then handcuffed, placed in a tribal police car, and was driven off the reservation.

**WHEREAS**, the Water Commissioners of the Sixth Judicial District Court are officers of the Humboldt Decree Court and any interference with their activities in regulating the Humboldt Decree constitutes contempt of court.

**WHEREAS**, pursuant to the Humboldt Decree and Nevada law the Water Commissioners have a right to access private lands that can only be reasonably accessed by traveling across the reservation.

**NOW THEREFORE, YOU ARE HEREBY ORDERED** to within five (5) days of the date of this Order,

signal an intent to permit the Water Commissioners of the Sixth Judicial District Court access to regulate any and all upstream headgates that supply the South Fork Reservation with irrigation water including such headgates on private land that can only be reasonably accessed by traveling through the reservation.

/s/ R. Michael Turnipseed, P.E.

R. Michael Turnipseed, P.E.

State Engineer

Dated at Carson City, Nevada this

20th Day of September, 1999.

**APPENDIX I**

**SUPREME COURT OF THE STATE OF NEVADA**

| | |
|---|---|
| SOUTH FORK BAND OF THE TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS OF NEVADA; MARVIN MCDADE, in his capacity as Chairman of the South Fork Band Council, Petitioners, vs. SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT, AND THE HONORABLE RICHARD A. WAGNER, DISTRICT JUDGE, Respondents. and STATE ENGINEER of the State of Nevada and WATER COMMISSIONERS of the Sixth Judicial District Court, Real Parties In Interest. | Case No. 35591<br><br>**EMERGENCY MOTION TO LIFT STAY OR, ALTERNATIVELY, TO ORDER POSTING OF SUPERSEDEAS BOND** |

COMES NOW, R. Michael Turnipseed, P.E., Nevada State Engineer, and the Water Commissioners of the Sixth Judicial District Court (hereinafter referred to jointly as the "State"), by and through the undersigned counsel, to file

this emergency motion to lift stay or, alternatively, to order the posting of a supersedeas bond by the South Fork Band of the Te-Moak Tribe of Western Shoshone Indians (the "Tribe"). This motion is based on the following points and authorities and the other pleadings and papers already on file in this case.

## POINTS AND AUTHORITIES

This proceeding arises out of a contempt action against the Tribe for its arrest of an officer of the Respondent Court--a Water Commissioner. The Tribe owns state decreed water rights that were owned by private ranches before they were acquired by the Tribe. Under state law, the Water Commissioners are responsible for administrating all water rights under the state decree. The Tribe will not allow a Water Commissioner to cross its lands to reach diversions on private land that provide the Tribe's water rights. The Tribe arrested a Water Commissioner who was attempting to regulate those diversions. The State filed a contempt action under state law against the Tribe. The Respondent Court scheduled a hearing for February 28, 2000, to consider the merits of the contempt action. The Tribe filed a petition for a writ of prohibition and a request to stay the Respondent Court's February 28, 2000, hearing. On February 17, 2000, this Court ordered the State to answer the writ petition and stayed the proceedings in the Respondent Court. On March 8, 2000, pursuant to this Court's order, the State filed an answer as the real party in interest and on behalf of the Respondent Court. On March 10, 2000, the State filed a motion to expedite review of this writ. The Court granted the State's motion to expedite and scheduled this matter for oral argument on June 14, 2000.

### A. Current Violations of Humboldt Decree.

As detailed in the State's answer, the Respondent Court has the duty and obligation to administer the waters of the Humboldt River pursuant to the Humboldt Decree. This administration is essential to protect all of the water right owners on the Humboldt River by assuring they will

receive their water rights and that no other party will take more water than they are entitled to.

The irrigation season on the Humboldt River downstream from the Palisades water measurement gauge (the "Lower Humboldt") began on March 15, 2000. The irrigation season on the Humboldt River above the Palisades gauge (the "Upper Humboldt") began on April 15, 2000. The water rights at issue in this case are those that were decreed by the Respondent Court and were later acquired by the Tribe. They are located in the Upper Humboldt portion of the Humboldt River.

On April 11, 2000, a Water Commissioner for the Sixth Judicial District Court flew over the Tribe's reservation to determine if the Tribe was using irrigation water. *See* Exhibit 1, Affidavit of Wayne Testolin. The Water Commissioner discovered that an illegal water storage reservoir has been constructed on a private ranch upstream from the reservation which contains stored water. *Id.* The Tribe restricts the Water Commissioner's access to that ranch. Also, the Water Commissioner observed substantial waters being diverted to irrigation on the reservation. Both of these activities are violations of the Humboldt Decree. Without a water storage right, and compliance with state law, a dam cannot be constructed. Further, on April 11, 2000, the Lower Humboldt River is the only portion of the Humboldt River that is entitled to divert water for any purpose. The Tribe's use of irrigation water before April 15, 2000, was in violation of the Humboldt Decree. Most importantly, the Tribe is manipulating the headgates that serve its water rights without the permission of the Water Commissioners. The Tribe is a successor-in-interest to decreed water right owners, and the Humboldt Decree enjoins successors-in-interest to decreed water right owners from interfering, opening, or closing headgates without the permission of the Water Commissioner. Appendix at 130, 131. Each day the Tribe continues to allow diversions without the permission of the Water Commissioners it violates the decree and deprives

downstream users of their water rights.

* * *

A Portion of Page 3 through Page 7 Omitted

* * *

RESPECTFULLY SUBMITTED this 5th day of May, 2000.

FRANKIE SUE DEL PAPA
Attorney General
By: /s/ C. Wayne Howle for
PAUL G. TAGGART
Nevada State Bar #6136
Deputy Attorney General
100 North Carson Street
Carson City, Nevada
89701-4717
(775) 684-1232
Attorneys for Respondents
and Real Parties in Interest

## APPENDIX I

IN THE SUPREME COURT OF THE STATE OF NEVADA

SOUTH FORK BAND OF THE TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS OF NEVADA; MARVIN MCDADE, IN HIS CAPACITY AS CHAIRMAN OF THE SOUTH FORK BAND COUNCIL,
Petitioners,
vs.
THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT, AND THE HONORABLE RICHARD A. WAGNER, DISTRICT JUDGE,
Respondents.
and
STATE ENGINEER OF THE STATE OF NEVADA AND WATER COMMISSIONERS OF THE SIXTH JUDICIAL DISTRICT COURT,
Real Parties In Interest.

No. 35591

ORDER DENYING STAY

On August 24, 2000, we issued an opinion (South

Fork Band, Te-Moak Tribe v. Dist. Ct., 116 Nev. ____, ____ P.3d ____ (Adv. Op. No. 87, August 24, 2000)) in which we denied petitioners' original petition for writ of prohibition seeking to prevent the district court from proceeding on a petition for an order requiring petitioners to show cause why they should not be held in contempt for interfering with the state engineer and water commissioners in regulating adjudicated water rights along the Humboldt River. Prior to the issuance of our opinion, on February 17, 2000, we temporarily stayed the district court proceedings pending consideration of the petition and answer. On July 24, 2000, we vacated our February 17, 2000, stay order.

On August 29, 2000, petitioners filed a motion to stay our August 24, 2000, opinion denying the petition, and petitioners request that the stay previously granted on February 17, 2000, be restored pending application to the United States Supreme Court for a writ of certiorari. The real parties in interest filed an opposition to the motion for stay on August 31, 2000. We have considered petitioners' request, and we deny their motion for a stay.

It is so ORDERED.

/s/ Shearing, J.
Shearing

/s/ Agosti, J.
Agosti

/s/ Leavitt, J.
Leavitt

cc: Hon. Richard A. Wagner, District Judge
Attorney General
Humboldt County District Attorney
Nevada Legal Services
Humboldt County Clerk

## APPENDIX K

File No. 2804-3

Dept. No. 1

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

****

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| IN THE MATTER OF THE DETERMINATION OF THE RELATIVE RIGHTS OF CLAIMANTS AND APPROPRIATORS OF THE WATERS OF HUMBOLDT RIVER STREAM SYSTEM AND TRIBUTARIES, STATE ENGINEER of the State of Nevada and WATER COMMISSIONERS of the Sixth Judicial District Court, Petitioners, vs. SOUTH FORK BAND OF THE TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS OF NEVADA; MARVIN McDADE, in his capacity as Chairman of the South Fork Band Council, Respondents. | ) | ORDER |

The Court addresses three issues in its order. The first is whether the Court has exclusive jurisdiction (as opposed to concurrent jurisdiction with the Federal Court) over the Tribe and its Chairman, Marvin McDade, in a contempt proceeding. The second is whether the conduct of

the Tribe and its Chairman constitutes contempt of court. The contemptuous conduct allegedly consisted of arresting the Court's Water Commissioner and wrongfully appropriating water. The third issue is if this Court finds contempt what the appropriate punishment and/or order to bring compliance should be.

## LAW OF THE CASE

The Nevada Supreme Court has previously ruled in this matter as follows and therefore that order becomes the law of the case:

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> We conclude that petitioners waived sovereign immunity when the United States purchased, and Petitioners took, the reservation land subject to previously adjudicated water rights. Petitioners ratified this waiver by their historical compliance with the Humboldt Decree, including paying assessment fees and permitting the state engineer and water commissioners access to the reservation. Consequently, petitioners are subject to the jurisdiction of the Sixth Judicial District Court, and we therefore deny the petition for writ of prohibition.
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> In 1913, the state engineer initiated water rights adjudication procedures for the Humboldt River. See Ormsby County v. Kearney, 37 Nev. 314, 142 P. 803 (1914). The state engineer issued an order of determination for the Humboldt River in 1923. As part of the adjudication, the Sixth Judicial District Court decreed water rights to five ranches. In 1935, the Sixth Judicial District Court amended the decree, completing its adjudication of water rights for the Humboldt River. This decree became known as the Humboldt Decree, and

thereafter, the state engineer and the water commissioners were responsible for distributing the water rights adjudicated under the Decree. Subsequently, between 1937 and 1942, the United States purchased the five ranches to form the South Fork Reservation for the Te-Moak Tribe of the Western Shoshone Indians (the tribe).

For approximately fifty-five years, the tribe cooperated with the state engineer and water commissioners, allowing them access onto the reservation. In particular, the tribe allowed the state engineer and water commissioners to enter the reservation and to traverse the reservation to reach private lands on which diversions that served the tribe's water rights, as well as other landowners' rights, were located. It appears from the documentation submitted to this court that the United States paid the assessment fees for a period of time in the 1970s and early 1980s, and that the tribe paid the assessment fees from the mid-1980s until at least the early 1990s. However, on March 8, 1998, the tribe adopted two resolutions decreeing that water commissioners would not be allowed to enter the reservation and that the tribe would not pay assessment fees that were charged against every holder of water rights in the Humboldt River.

Subsequently, and at different times, the state engineer and water commissioners of the Sixth Judicial District Court filed three contempt proceedings in the Sixth Judicial District Court. We are presently concerned with the third contempt proceeding, which is the subject of this petition. In that contempt proceeding, the state engineer sought an

order from the district court directing petitioners to show cause why they should not be held in contempt for frustrating the water commissioners' enforcement of the Humboldt Decree, specifically regarding an incident that occurred on September 13, 1999.

On September 13, 1999, Wayne Testolin, a supervising water commissioners, and two other water commissioners entered the reservation to reach a private ranch adjacent to the reservation, known as the Gund Ranch, for the purpose of regulating the river pursuant to the Humboldt Decree. Some of the tribe's water rights are served by diversions located on the Gund Ranch. Consequently, to properly control the tribe's water rights, as well as water rights for other private landowners, the diversions located on the Gund Ranch must be adjusted. When the water commissioners entered the reservation, they were followed by a tribal peace officer. The water commissioners traveled off the reservation and onto the Gund Ranch, where they were stopped by the tribal peace officer and Mr. Marvin McDade, chairman of the South Fork Band Council, and escorted back to the tribal office on the reservation. Mr. Testolin was handcuffed, charged with trespass and escorted off the reservation.

* * *

In this case, the tribe is the successor-in-interest to owners of Humboldt Decree water rights and has enjoyed the benefits of the Decree. Until 1998, water commissioners entered the reservation without interference to regulate the Humboldt River to ensure that all users received their decreed water rights. For the past fifty-five years, the tribe allowed

the water commissioners to travel on and across the reservation, and the tribe paid assessment fees pursuant to the Decree for some period of time between the mid-1980s and early 1990s. Finally, the deeds to the property the United States purchased for the tribe specifically mention the appurtenant water rights and/or the Humboldt Decree. We conclude that the purchase of the reservation land subject to previously adjudicated water rights constituted an express waiver of sovereign immunity, and that the Tribe's actions in benefiting from and abiding by the Humboldt Decree for more tha[n] five decades served to ratify this waiver. See State Engineer v. South Fork Band of Te-Moak Tribe, 66 F. Supp. 2d at 1163, 1172 (D. Nev. 1999) (stating that "[i]f there remain[s] any doubt as to the United States[']' express and unequivocal waiver in behalf of the Tribe, in its initial purchase of the decreed rights, the Tribe's actions over the ensuing fifty years since the purchase of their decreed water rights clearly demonstrate a continuing ratification of its initial waiver of immunity").

We have recognized that the Sixth Judicial District Court has continuing jurisdiction over matters arising out of the administration of the Humboldt Decree. State Engineer v. Sustacha, 108 Nev. 223, 826 P.2d 959 (1992). The Sixth Judicial District Court has the authority to hold in contempt those who interfere with or frustrate the actions of the state engineer or water commissioners in the administration of the Humboldt Decree. State v. District Court, 52 Nev. 270, 286 P. 418 (1930).

* * *

> However, here, as the purchase of the tribe's reservation land subject to the Humboldt Decree, constituted a waiver of sovereign immunity, the Sixth Judicial District Court is within its authority in exercising jurisdiction over the tribe concerning its alleged interference with the administration of water rights pursuant to the Decree. To hold that the tribe is not amendable to the jurisdiction of the Sixth Judicial District Court under these circumstances would frustrate the district court's authority over matters arising out of the administration of the Decree.

The Nevada Supreme Court further ruled that the United States is not an indispensable party since the Tribe and not the United States created and adopted the resolutions that frustrated and interfered with the Water Commissioners' efforts to regulate the Humboldt River.

HISTORICAL PERSPECTIVE OF NEVADA WATER LAW

The Federal Government recognized in the Desert Land Act of 1887 the supremacy of state law in respect to the acquisition of water within the various states. Due to the scarcity of water in the western states, including Nevada, the Doctrine of Prior Appropriation of Beneficial Use has been adopted as the means of adjudicating various water rights within the State of Nevada. In order to appropriately adjudicate the water of a particular stream, it is required that all of the parties owning or claiming rights to a particular stream be joined in a decree. In 1952 the McCarran Amendment was passed as an act of Congress which permitted the United States of America as an owner of water rights to be joined as a defendant in any suit for the adjudication of said right. (66 Stat. 560, 43 USC §666 [43 USCS §666].) The McCarran Amendment states:

> ...consent is ... given to joint the United States as a defendant in any suit (1) for the adjudication ... or (2) administration of [water] rights, where it appears that the United States is the owner ... by appropriation under state law, by purchase, by exchange, or otherwise ...

Additional history of the McCarran Amendment indicates the State should have control over the waters within its boundaries. The Senate Report on the McCarran Amendment states:

> In the arid Western States, for more than 80 years, the law has been that the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.... Since it is clear that the States have the control of water within their boundaries, it is essential that each and every own along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.
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> S.Rep. No. 755, 82d Cong., 1st Session 3, 6 (1951).

The McCarran Amendment has been cited by many courts and interpreted in various ways. Some courts have held that the McCarran Amendment conferred concurrent jurisdiction upon the federal and state court systems. In 1963 in the case of Dugan v. Rank, 372 U.S. 609, 10 L.Ed.2d 15, 83 S.Ct. 999 (1963), the United States Supreme Court held that under the McCarran Amendment the Federal Government waived its consent to be sued in state court only in general adjudications of water rights. Later various other opinions by the United States Supreme Court held

that the waiver of sovereign immunity by the United States covered federal reserve water rights. The interpretation of the McCarran Amendment has been varied and sometimes very inconsistent depending on the facts of the particular situation. These cases are easily distinguishable from the present case. In those cases courts were asked to determine (adjudicate) an Indian tribe's reserved water rights that were unappropriated when the tribe's land was separated from the public domain by treaty or executive order. None of these facts exist in the present case.

As the McCarran Amendment relates to the Humboldt River Adjudication, there can be little argument as to the intent of Congress as it relates to that particular decree. It is clear from the legislative history taken from the Congressional Record, particularly from the 82d Session of Congress and the hearings Record of the Senate Sub-Committee as to the intent to the McCarran Amendment as it relates to the Humboldt Decree, by name. Senator McCarran's committee report on Senate Bill 18 of the 82d Congress from the Committee on the Judiciary stated:

> The committee is aware of the fact, as shown by the hearings, that the United States Government has acquired many lands and water rights in States that have the doctrine of prior appropriation. When these lands and water rights were acquired from the individuals the Government obtained no better rights than had the persons from whom the rights were obtained.

The basis for this particular part of the report relates to evidence that was submitted at hearings before the Sub-Committee for the Judiciary, United States Senate, on April 25, August 3 and 8 of 1951. As a part of those committee hearings, a statement of W. T. Mathews, Attorney General of the State of Nevada, in support of Senate Bill 18 was submitted by George S. Green, a member of the professional staff of the Sub-Committee. Within that statement are references to two situations that existed within the State of

Nevada, both before this very Court, which were some of the primary reasons Senator McCarran from Nevada proposed Senate Bill 18.

The above two situations and the present case all have the same pertinent facts. The United States purchased land from private owners. The land was not part of the public domain at the time of purchase. 2. The water rights appurtenant to the land had been appropriated (as opposed to unappropriated) and adjudicated by the state courts many years prior to the conveyance to the United States. In the present case the decreed water rights contain priorities in the late 1800s. The United States bought the land between 1932-1938. 3. The United States bought the land in trust for the Indians. 4. All three situations dealt with the state courts' effort to administer (enforce) a water decree as it related to the Indians. In addition, the deeds to the property in the present case mention the appurtenant water rights and/or the Humboldt Decree. Because of the importance of these references as they specifically relate to the present case, even though they are lengthy, they are included as a part of this Order:

> Pursuant to our statutory law, order has been brought out of chaos, vested water rights of years' standing and acquired as far back as the 1860's have been adjudicated and the relative rights to the use of the waters of our stream systems have been established, new rights granted and perfected to the end that a fair, equitable and just division of our public waters has been in the main perfected. For example, the rights of more than 600 water users on the Humboldt River stream system have been determined and the amount of water and time of use thereof of each individual claimant established in the final decree of one of our district courts, a proceeding which required some 15 years of research and court hearings. After such

decree was entered and made final by an appeal to our Supreme Court, there remained and remains the administration of those rights and the enforcement of the provisions of the decree by the office of the State engineer and his assistant, and/or the courts of the State necessitating further proceedings in our courts from time to time. It is with respect to the administration of the decreed water rights in the courts that a major difficulty arises where the United States has acquired one or more of the decreed rights for the use of one or more of its departments. Where such is the case and proceedings are brought by the State engineer or by some interested water user to enforce the provisions of a water decree, the claim in most every case is made that the water right acquired by the United States is immune from any administrative order of the State court, and in some cases immune from administration by the State engineer because of the constitutional immunity of the United States from suit by any person or entity.

It is most clear that where water rights have been adjudicated by a court and its final decree entered that, or where such rights are in the course of adjudication, that court wherein such proceedings are had is the court possessing the jurisdiction to enter its orders and decrees and thereafter to enforce the same by appropriate proceedings. Certainly in the administration of and the adjudication of water rights under State laws that the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any

stream system, any order or action affecting one right affects all such rights. All water users on such stream then in practically every case are interested and necessary parties to any court proceedings. It is apparent then that any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments by claiming immunity from suit in or orders of a State court, can, does, and will most materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Removal by the United States or its interested department to a Federal court wholly fails to solve the problem. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Congress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are drawn in question. Senate bill No. 18 was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.

A most concrete example of the effect of immunity from suit enjoyed by the United States and its departments occurred in Nevada in recent years. Beginning about the year 1907 the respective water users on the Quinn River stream system in northern Nevada began an action in the Sixth Judicial District Court of Nevada, in and for Humboldt County, for the purpose of

adjudicating the relative water rights of that stream. Such action was brought by such users under the then existing practice. After some 12 years of litigation a final decree of the court was entered on April 9, 1919, settling and adjudicating some 75 separate rights to the use of the water, fixing the priorities, amount of water and the number of acres to which the water was made appurtenant. This particular stream system at the time of the adjudication was not placed under the jurisdiction of the State engineer. The parties to the action were, as to the administration of the relative rights, required to petition the court from time to time for redress of grievances with respect to the use of water. Several years after the entry of the decree the United States, through the Bureau of Indian Affairs, Department of the Interior, United States Government, purchased certain lands and water rights on the Quinn River. The water rights, some three in number, had theretofore been adjudicated and determined in the aforesaid decree. Down through the years the administration of the rights under the decree became increasingly difficult with the result that in 1947 the Legislature of Nevada amended the water law so as to bring the Quinn River and its decreed water rights within the provisions of the 1913 water law, with the administration of such rights placed within the official duties of the State engineer in order that there would be efficient and lawful division of the water in question. The amendment of the law being known as section 46-1/2 of the 1913 law. This section was again amended at 1949 statutes, page 83. After the 1947 amendment became effective the district court of Humboldt County,

pursuant to the amendment and by its order, placed the State engineer in charge of the administration of the decree of that court.

Certain difficulties were encountered in the diversion of the waters in question. Differences of opinion arose as to the interpretation of the decree, with the result that in May of 1949, the Pacific Live Stock Co. instituted an action in the said district court, numbered 1596, against the Ellison Ranching Co., and all other water users mentioned in the decree and/or their successors in interest for the purpose of settling disputes and controversies that had arisen, requiring further interpretation of the decree. The Carson Indian Agency of the Bureau of Indian Affairs of the United States Department of the Interior, hereinafter called Indian service, as user of said three water rights and lands purchased by the United States, was made a party defendant by order of the State court. The Indian service was most necessary party to the determination of the action. Its water rights, or rather the rights of the United States, were and would be affected by the orders of the court, as well as all the other rights. A complete determination was not possible unless all water users were brought before the court due to the interlocking nature of the adjudicated water rights. The Indian service objected to the jurisdiction of the State court, notwithstanding its water rights had theretofore been adjudicated by the court, prior of course to the purchase thereof by the United States, but which nevertheless were and are part and parcel of water rights of the stream system and entitled to no more nor no

less consideration than the water right of the poorest rancher there involved.

In July of 1949, upon the direction of the Attorney General of the United States, the action in question was removed from the State court to the District court of the United States in and for the District of Nevada, in case No. 796, upon the ground that it was an action arising under the Constitution and laws of the United States in that the United States was made a party to the action and that the United States had not given its consent thereto. Thereafter in December of 1949 the United States district judge held that the United States had not consented to be sued in the action and ordered the action remanded back to the State court. The action as so remanded then lodged in the State court for further proceedings in that court without the Indian service being continued a party therein. The result of the matter was and is that the action has not proceeded further. No order of the State court could then determine the controversy so far as the Indian service rights were or are concerned, as it was and is absolutely immune from court proceedings in the State court, as well as the Federal court.

It is most clearly apparent that such a situation cannot help but result in a chaotic condition. Each water user under the Nevada law is required to pay a graduated fee or tax annually for the services of water commissioners. The commissioners, under the direction of the State engineer, must apportion the water to the decreed users thereof in accordance with their decreed rights, and are required to deny the use of water to any user who at a particular time is

not in the priority for the available supply of water. Failure to comply with the lawful orders of the water commissioner subjects the offender to the administrative and penal orders of the court, usually issued in contempt proceedings. If a water user possessing a decreed water right is immune from suits and proceeding in the courts for the enforcement of valid decrees, then indeed will the long years of travail through which the water laws of our Western States have passed in the earnest endeavor of their proponents to effect honest, fair, and equitable division of the public waters have been in vain.

If such a condition is to continue in the future it will result in a throw-back to the conditions that brought about the enactment of the statutory water las, i.e., the necessity that the public waters so necessary to the economic welfare of the arid States be allotted in as equitable manner as possible to all users of the available supply thereof. It was said of such laws by the Supreme Court in the case of Pacific Live Stock Co. v. Oregon Water Board, (241 U.S. 440):

From these statements it can be logically concluded that in main part Senator McCarran pushed to have the McCarran Amendment passed to deal with the very issue which is before this Court, and that its intent was to provide that the Humboldt River Adjudication would be dealt with in all future proceedings in the State Court rather than the Federal Court.

Although it has been of little significance to other judges and writers concerning the McCarran Amendment, it is of great significance to this Court that the McCarran Amendment was amended prior to its passage by the United States Congress. Originally Senate Bill 18 provided

that when the United States was a party to any suit involving water, the Federal Government had the right to remove such suit to Federal Court. Significantly the bill was amended to strike out that provision. (See Congressional Record–Senate (June 21, 1952), p. 7817.) By implication such amendment and the legislative intent was to not allow the Federal Government in such cases to remove such cases to Federal Court.

Of further significance in the legislative history of the McCarran Amendment, on October 11, 1951 Senator McCarran in speaking on behalf of the bill states:

> Particularly in view of the fact that the United States has acquired its water rights from former owners who were subject to such suits, the committee is of the opinion that to allow the United States in its own right or as a trustee to have a better right than the former owner is not fair and just to the other water users on the stream.
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> See Congressional Record–Senate, October 11, 1951, pg. 12948.

The United States Supreme Court, as well as other courts, interpreted the McCarran Amendment to uphold the right of state courts to adjudicate and administer Indian water rights. This Court acknowledges that the Nevada Supreme Court has already ruled on many of the issues of this case, including jurisdiction under South Fork Band of the Te-Moak Tribe of Western Shoshone Indians of Nevada, et al. v. The Sixth Judicial District Court of the State of Nevada filed August 24, 2000. This Court recognizes this opinion to be the law of the case but believes additional legal authority should be provided as it pertains to this case.

In Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 77 L.Ed.2d 837, 856; 1035 Ct. 3201 (1983), the court stated:

> [T]he McCarran Amendment did not waive the sovereign immunity of Indians as parties to state comprehensive water

adjudications, it did (as we made quite clear in Colorado River) waive sovereign immunity with regard to the Indian rights at issue in those proceedings.

In Colorado River Water Cons. Dist. v. U.S., 424 U.S. 800, 476 L.Ed.2d 483, 494; 96 S. Ct. 1236 (1976) the court stated:

> Not only the Amendment's language, but also its underlying policy, dictates a construction including Indian rights in its provisions. Eagle County rejected the conclusion that federal reserved rights in general were not reached by the Amendment for the reason that the Amendment "[deals] with an all-inclusive statute concerning 'the adjudication of rights to the use of water of a river system.'" Id., at 524, 28 L Ed 2d 278, 91 S Ct 998. This consideration applies as well to federal water rights reserved for Indian reservations. And cogently, the Senate report on the amendment observed:
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> "In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper
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> [424 US 811]
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> and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim

immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts."

Thus, bearing in mind the ubiquitous nature of Indian water rights in the southwest, it is clear that a construction of the Amendment excluding those rights from its coverage would enervate the Amendment's objective.

Finally, legislative history demonstrates that the McCarran Amendment is to be construed as reaching federal water rights reserved on behalf of Indians. It was unmistakably the understanding of proponents and opponents of the legislation that it comprehended water rights reserved for Indians. In the Senate hearings on the Amendment, participants for the Department of Justice and the Department of the Interior made clear that the proposal would include water rights reserved on behalf of

[424 US 812]

Indians.

Lastly, the Supreme Court of Montana in the case of Matter of Beneficial Water Use Permits, 923 P.2d 1073, 1083 (Mont. 1996) stated:

> The United States Supreme Court has concluded that the McCarran Amendment includes Indian reserved water rights, thus, the states have jurisdiction to adjudicate Indian water rights. Colorado River Water Conservation Dist. v. United States (1976), 424 U.S. 800, 809-10, 96 S.Ct. 1236, 1242, 47 L.Ed.2d 483, 493-94.

The McCarran Amendment, as interpreted in Colorado River, allows and encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications.

## THE McCARRAN AMENDED AS IT IS APPLIED TO THE HUMBOLDT RIVER DECREE

The Humboldt River Decree is a fully adjudicated water decree within the State of Nevada consisting of two main decrees known as the Bartlett Decree and Edwards Decree. Proceedings were initiated by the State Engineer of the State of Nevada for the adjudication of the water rights of the Humboldt River about 1903, and an Order of Determination was prepared by the State Engineer and filed with the State Court in 1925 before Judge Bartlett. His decree was filed in 1931. That case was later reopened and hearings conducted by State Judge Edwards for making a number of changes in the Bartlett Decree which was filed in 1935. (See State of Nevada, Dept. of Conservation and Natural Resources, Humboldt River Water Distribution by George W. Hennen - 1964.) Within the Bartlett Decree is a finding of the State Court under finding No. 44, on page 28 of the Humboldt River Adjudication. The Court found that the water of the stream system was fully appropriated and that there was no surplus water for irrigation. This adjudication decree depends upon return flows to fill the adjudicated water rights as it relates to approximately 610 individual parcels of land. Subsequent to the final decrees of the Bartlett and Edwards Decrees, efforts were made to reopen the case but the Nevada Supreme Court upheld a permanent injunction against modifying the decrees. (See Carpenter v. District Court, 59 Nev. 42, 73 P.2d 1310 (1937).

The Humboldt Decree was adjudicated before the McCarran Amendment was passed. It was a complete and general adjudication of all rights on the Humboldt River under the exclusive Jurisdiction of the Sixth Judicial District Court of the State of Nevada in and for the County of Humboldt.

Thus, the original adjudication orders were not McCarran Amendment Decrees. However, as clearly shown by the legislative history of the McCarran Amendment there can be no question that it was intended that the Humboldt Decree by name was for future administration purposes to come under the auspices of the McCarran Amendment with exclusive jurisdiction resting with the State Court.

## JURISDICTION

As a preliminary matter, it is necessary to comment on this Court's jurisdiction over this matter. This Court determines that it has exclusive jurisdiction of this matter and all other matters arising out of the Humboldt Decree. This determination is based on the holding in United States v. Alpine Land & Reservoir Company,. 174 F.3d 1007 (9th Cir. 1999). In that case the United States Court of Appeals for the Ninth Circuit held that the Federal Court that entered the Alpine Decree, which adjudicated the water rights on the Carson River, has exclusive jurisdiction over all matters arising under that decree. Accordingly, the Ninth Circuit upheld an injunction that was entered by the Alpine Decree court that enjoined a State Court from considering a matter that involved waters that had been adjudicated in the Alpine Decree. Based on the reasoning in Alpine Land, this Court determines that it has exclusive jurisdiction over all legal matters concerning waters that were adjudicated in the Humboldt Decree.

Particularly, the Ninth Circuit referred to the following statement in Kline v. Burke Const. Co., 260 U.S. 226, 229-30 (1922):

> [State and federal courts] do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when

> one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void.
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> Alpine Land, 174 F.3d at 1013.

Based on this principle, the Alpine Land court commented that:

> [T]he reason why exclusivity is inferred is that it would make no sense for the district court to retain jurisdiction to interpret and apply its own judgment to the future conduct contemplated by the judgment, yet have [another] court considering what the [decree] court meant in the judgment. Such an arrangement would potentially frustrate the [decree] court's purpose.
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> Id., citing to Flanagan v. Arnaiz, 143 F.3d 540, 545 (9th Circ. 1998).

In enforcing decreed water rights, the Nevada Legislature stated: "After the filing of the order of determination in the district court, the distribution of water ... shall, at all times, be under the supervision and control of the district court." (NRS 533.220.)

The Nevada Supreme Court very recently held:

> [B]cause the Humboldt Decree adjudicates Humboldt Stream System water rights and was issued by the Sixth Judicial District Court, we conclude that litigation concerning Humboldt Stream System water rights should be carried out and resolved only in the Sixth Judicial District Court." (Emphasis Added.) Nevada v. Sustacha, 108 Nev. 223, 226, 826 P.2d 959 (Nev. 1992).

Based upon these holdings, this Court determines that its jurisdiction is exclusive, not concurrent with any other court. In two other actions that were filed in this Court and which are closely related to the action at bar, the Federal Government, the Tribe, and Mr. McDade removed the actions to federal court. Those actions were recently remanded to this Court by the Federal Court. The Federal Court ruled that it shares concurrent jurisdiction over those cases with this Court. This Court believes that ruling was incorrect.

This Court acquired exclusive jurisdiction over the waters of the Humboldt River when it became the first court to enter an in rem adjudication of the waters in that river. An arrangement involving concurrent jurisdiction over this river is contrary to this principle. As was properly stated in Alpine Land, such an arrangement will potentially frustrate this Court's purpose--that of administering the Humboldt Decree.

As it relates to the Humboldt Decree, the Nevada Supreme Court ruled in two early contempt cases that the Water Commissioners deliver the water of the Humboldt River pursuant to the decreed water rights under the direction and control of the Sixth Judicial District Court. (Malone v. District Court, 52 Nev. 270, 286 Pac. 418 (1930) and State ex rel. Hinckley v. Sixth Judicial District Court, 53 Nev. 343, 1 P.2d 105 (1931).)

These 1930 and 1931 precedent cases establishing the administration of water on the Humboldt River to be under the direction of the Sixth Judicial District Court has been reemphasized in the Sustacha case, supra. Nowhere in any of these opinions is there any suggestion by the Supreme Court of Nevada that a Federal Court has concurrent jurisdiction over the Humboldt Decree. The interference in this case by the Federal Court has resulted in the past two years to no administration on the Indian property. Had the past two years been scarce water years, the economic impact on other water users could have been disastrous. There is no way for a federal judge to control the Sixth Judicial

District Court's Waster Masters or to provide their own Water Masters without bring chaos to the Humboldt Decree which fact was recognized by Senator McCarran. The Federal Court has no more authority (concurrent jurisdiction) to control this Court's Water Masters than this Court has to control a Federal Water Master.

Accordingly, this Court finds that it has jurisdiction over the Tribe and Mr. McDade. When the five private ranches that comprise its reservation were acquired to form the reservation, those ranches had appurtenant water rights that were subject to the exclusive jurisdiction of this Court. This Court's jurisdiction over the Tribe is based on this Court's original and exclusive jurisdiction over the Tribe's water rights, not based upon the Tribe's waiver of sovereign immunity.

By the United States purchasing five ranches which had previously been adjudicated to private individuals under the decree, the United States Government as Trustee for the Indians submitted to the jurisdiction of the State Court.

Some authorities in water law deem it appropriate to separate for jurisdictional purposes the adjudication portion of a decree as opposed to the administration of a decree.

In some instances it might be appropriate to separate out the jurisdiction of adjudication as opposed to administration. In some situations it may also be appropriate to split the jurisdiction of adjudication as opposed to administration. It is even possible in some situations to provide that an Indian tribe may have separate rights to administer a decree once a certain amount of water is delivered to the border of the tribal property.

At various times during the course of hearings on this matter, the Tribal Chairman, Marvin McDade, claimed the Indians were claiming a "Winter's Case" right. This Court can only interpret such claim to be what is commonly called a reserved water right.

In explaining the Reserved-Water-Rights-Doctrine, the United States Supreme Court in the case of Cappaert v. U.S., 426 U.S. 128, 48 L.Ed.2d 523, 96 S.Ct. 2062 (1976) explained:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the commerce Clause, Art I, §8, which permits federal regulation of navigable streams, and the Property Clause, Art IV, §3, which permits federal regulation of federal lands. The doctrine applies to Indian Reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams. (Emphasis added.)

There is no evidence before this Court that in fact there is a basis for a reserved water right held by the Indians in this case.

If in fact, arguendo, the United States by the purchase of these five ranches could in some way say the Indians had obtained a reserved right, under the Cappaert case, supra, the vesting of such rights at the earliest would be the purchase dates of the ranches. This means that their priority dates of their water delivery would be in the 1930's and 1940's as compared to the late 1800's under the Water Decree. This means the Indians would be deprived of valuable water priorities if their rights are in fact reserved rights.

In the case before this Court, the United States Government purchased non-Indian private property consisting of five separate ranches which had already been fully adjudicated. The administration of the water was under an integrated method. There were no reserved Indians' rights which were in place on said property at the time of purchase. These acquired rights in spite of some writers' opinions to the contrary did not by some magic act turn into reserved Indians' rights simply by the act of purchase in trust by the United States Government. Theoretically if there had existed at the time of purchase, reserved Indian rights on the very same property which was acquired by purchase then one might argue that the acquired rights took on the status of reserved rights and the Indians may have some claim to administer such right.

To argue that by the United States simply purchasing water rights which are subject to the exclusive jurisdiction of a State water decree by some magic creates a new superior property right is nonsense. Under the most basic tenants of property law, no one can claim a greater right than the right which was purchased. This very issue is clearly a part of the legislative history of the McCarran Amendment as has been previously discussed.

The Humboldt Decree could not in any reasonable fashion be administered by both the water masters and the Indian tribe. In purchasing the five ranches the United States Government did not purchase a block of water to be delivered to the tribal boundary. Each of the five ranches have a varied number of water rights. Each of these rights on each ranch has a different priority and is designated for a specific field or piece of property. This is clearly shown by the exhibits attached hereto from the Humboldt Decree. See Exhibit "A" (A. J. Dewar Ranch), Exhibit "B" (Clark Drown Ranch), Exhibit "C" (A. M. Griswold Ranch), Exhibit "D" (J. J. Hylton Ranch), and Exhibit "E" (P. J. Ogilvie Ranch). The original ranchers who first obtained the water rights obtained them at different times. Thus, even as to each individual ranch in a short water year, some fields may get

water and others not. Also, adjustments during the short irrigation season may have to be made for each field on an almost daily basis, depending on what other properties throughout the entire system of 600 users are in priority. The water for administrative purposes cannot serve two masters.

CONTEMPT

On November 9, 1999 at 12:14 p.m. the State Engineer and Water Commissioners, through their attorney, filed a petition for order to show cause why the Tribe and Chairman McDade should be held in civil contempt. A party must comply with NRS 22.030 in order to find a party in civil contempt. NRS 22.030(2) states:

> 2. When the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt....

An affidavit in a contempt case involving the wrongful diversion of water is sufficient to give the Court jurisdiction, if (1) it substantially states the fact of the rendition of judgment, (2) that the judgment is in full force and effect, (3) that the defendant disobeyed the decree, and (4) threatens to continue a violation thereof. Phillips v. Welch, 12 Nev. 158, 165-168 (1877); See also Strait v. Williams, 18 Nev. 430, 431 (1884). In this case, the several affidavits submitted are consistent with the testimony at trial as stated in this order. Thus, the affidavits are sufficient to give this Court jurisdiction.

The district court sitting as a court of equity has full and complete authority to see that its decrees are enforced. See McCormick v. District Court, 69 Nev. 214, 226, 246 P.2d 805 (1952).

The court may enforce its decrees through employment of a water master; and if available, the State Engineer's office. Id. Either administrator is subject to the supervision and control of the court. (NRS 533.220(1);

McCormick v. District Court, 69 Nev. 214, 227, 246 P.2d 805 (1952); Jahn v. District Court, 58 Nev. 204, 212, 73 P.2d 499, (1937).) The purpose of the statute is to clothe the State Engineer with the administrative and the courts with the judicial powers and duties essential to the control and distribution of the public waters of the state. (Jahn v. District Court, Supra at 212.)

Contempt proceedings initiated by the State Engineer have to be supported by a showing that he was distributing water in accordance with the decree. McCormick v. District Court, Supra at 228; State Ex Rel. Hinckley v. Court, 53 Nev. 343, 354, 1 P.2d 105 (1931). Officers who are engaged in the distribution of water on the Humboldt River are officers of the court, under whose supervision and control it was being distributed. (State v. District Court, 52 Nev. 270, 277, 286 P. 418 (1930).) It is a universal rule that any interference with an officer of the court in the discharge of his official duties constitutes contempt. Id. at 276. Similarly, one who interferes with the possession of a receiver is in contempt of court because the possession of the receiver is the possession of the court, since the receiver is an officer of the court. Id. at 277, 23 R.C.L. p. 64. By analogy, in this case for purposes of control and distribution, the water of the Humboldt River Stream System, during the irrigation season, is in custodia legis. Id., State v. District Court, 52 Nev. 270, 277, 286, P. 418 (1930).

Courts are unanimous in holding that all constitutional courts have inherent power to punish for contempt any act which tends to impede, embarrass, or obstruct them, or their officers, in the discharge of their duties. In addition, it has been consistently held that words alone may constitute contempt. (See 68 A.L.R. 3d 273, 285, 30 A.L.R. 4th 155. State v. District Court, 270, 275 (1930), 13 C. J. 46 (1930).) The remedies of a court of equity are plastic and may be molded to meet the exigencies of the case. (McCormick v. District Court, Supra at 225, Winston's Appeal, 97 Pa. 385.)

The Nevada Supreme Court has decreed "It is well settled that a water right is realty." (Nenzel v. Rochester Corporation, 50 Nev. 352; 259 P. 632 (1927).) The high court has also declared that such a right cannot be adjudicated in a contempt proceeding. (In re Banber Creek and Its Tributaries (Scossa v. Church), 46 Nev. 254, 260, 262, 205 Pac. 518, 210 Pac. 563 (1922).)

As pointed out in the State's brief, a court may employ sanctions in contempt proceedings to ensure compliance with its orders. (Hildahl v. Hildahl, 95 Nev. 657, 663, 601 P.2d 58, 62 (1979).) The process is primarily coercive in order to bring compliance, rather than punitive. Id. These sanctions are proper. Id.

The Nevada Supreme Court held that the inherent power of courts in contempt actions is not limited by the power that the legislature may grant. (All Minerals Corp. v. Kunkle, 105 Nev. 835, 837, 784 P.2d 2, 4 (1989).) "While the statutes provide no other penalty for contempt [than NRS 22.100], we have held that a court may take other measures to insure that the parties obey the court's order." Id. Therefore, a court's contempt powers go beyond the penalties specified in NRS 22.100. Id.

INTERFERENCE WITH WATER COMMISSIONERS IN THE PERFORMANCE OF THEIR DUTIES

In the contempt hearing it was alleged that the Tribe and chairman wrongfully interfered with the Water Commissioners in the performance of their duties. NRS 533.305(1)(3) states:

> 1. The state engineer shall divide or cause to be divided the waters of the natural streams or other sources of supply in the state among the several ditches and reservoirs taking water therefrom, according to the rights of each, respectively, in whole or in part, and shall shut or fasten, or cause to be shut or fastened, the headgates or ditches, and shall regulate, or cause to be regulated,

the controlling works of reservoirs, as may be necessary to insure a proper distribution of the waters thereof.

* * *

3. ... Such water commissioner shall have the right of ingress and egress across and upon public, private or corporate lands at all times in the exercise of his duties.

In a contempt proceeding arising out of the distribution of water on the Humboldt River, as in this case, it was argued that the statute did not expressly authorize a Water Commissioner to open a spillway. Similarly, it has been argued that the statute does not authorize the Water Commissioners to cross a reservation.

Regarding this contention, the Court stated:

1-3. In determining this question, we must look to the intention of the legislature in enacting the water law. In Vineyard Land & Stock Co. v. District Court, 42 Nev. 1, 171 P. 166, we held that the proceeding under the water law is a quasi public proceeding, wherein all claimants to the use of water of a stream system may have their claims adjudicated, to the end that the waters of the stream may be distributed under public supervision without needless waste or controversy. In other words, it was the intention of the legislature that the people who are entitled to the use of the waters of a stream system actually get it without needless waste or controversy. The statute must be interpreted in the light of that intention. This court, in State v. Ross, 20 Nev. 61, 14 P. 827, and other cases, has held that the intent of a statute will prevail over the literal sense. Such is the well-recognized rule. 2 Lewis' Sutherland, Stat. Const. p. 694. Interpreting

the statute according to its obvious intent, we must hold that the officer had the right to open the spillway.

4. It is a well-known rule of statutory construction that, whenever a power is given by statute, everything lawful and necessary to the effectual execution of the power is given by implication of law. State v. Great Northern Ry. Co., 68 Wash. 257, 123 P. 8.

State Ex Rel. Hinckley v. Sixth Judicial District Court in and for Humboldt County, Et Al., 53 Nev. 343, 352, 1 P.2d 105 (1931).

In this case, the Water Commissioners in precluding the needless waste of water have the right to traverse public, private, corporate and other land, including reservations, to carry out the intent of the statute.

THE TRIBE'S WRONGFUL DIVERSION OF WATER

The Tribe and its Chairman violated the Bartlett Decree in wrongfully diverting water in violation of said decree. Page 244 of the Bartlett Decree states:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each and every water user and claimant to the Humboldt stream system and its tributaries and each of their agents, attorneys, servants and employees, and their successors in interest and all and every person or persons acting in aid or assistance of the said parties or either of or any of them be, and that each of them is, hereby perpetually enjoined and restrained as follows, to wit:

(a) From at any time diverting or using any of the water of the Humboldt stream system and its tributaries hereinbefore mentioned, except to the extent and in the amount and in the manner and at the time or times set by this Decree to such respective

party hereto allotted, allowed, prescribed and determined, or allowed by permits which have been or may hereafter be granted by the State Engineer of the State of Nevada.

(b) From diverting from the natural channel and from using any of the said water for irrigation or for any other purpose, in excess of the specific allotment herein set by this Decree, or in excess of the specific allotment under a permit granted or that may hereafter be granted by the State Engineer of the State of Nevada.

(c) From diverting from the natural channel and from using any of the said water in any other manner or for any other purpose or purposes or upon any other land or lands than as provided and prescribed by the terms of this Decree or by a permit granted or that may hereafter be granted by the State Engineer of the State of Nevada.

(d) From diverting from the natural channel and from using any of the said water at any other time or times than as specified and provided by the terms of this Decree or by a permit granted or that may hereafter be granted by the State Engineer of the State of Nevada.

(e) From in any manner meddling with, opening, closing, changing, injuring, or interfering with any headgates, weirs, water box, flume or measuring device, placed, installed or established by the State Engineer or by his authority or direction, unless such act be done by the permission or authority of the Water Commissioner, if during the period of his regulation or control of said water, or if not done during such period, then by virtue

of the allowances, authority, terms and provisions of this Decree or by a permit granted or that may hereafter be granted by the State Engineer of the State of Nevada.

During the contempt hearing, this Court inquired of the Tribal Chairman how the Tribe could administer the decree if it was given over to them. The Court stated:

> THE COURT: I don't want you to go into this very far, sir, but I want to know during the course of time who's been determining how much water you've been getting.
>
> THE WITNESS [Chairman McDade]: We have.
>
> THE COURT: You have.
>
> THE WITNESS: The tribe, tribe's water. Our eyeball is as good as Mr. Testolin's.
>
> THE COURT: Pardon?
>
> THE WITNESS: Mr. Testolin said he eyeballed it. Our eyeball is just as good as his.
>
> THE COURT: Okay. So your own tribal people were eyeballing how much water they were taking?
>
> THE WITNESS: Yes, sir.
>
> * * *
>
> THE COURT: Okay. Go ahead.
>
> BY MR. TAGGART:
>
> Q Is it true that an employee under your supervision manipulated the head gates at the main stem of the South Fork?
>
> A Yes, sir.

Transcript, pp. 65, 66.

Water Commissioner Wayne Testolin testified that there were quite a few places where the Tribe was receiving water through the ditches prior to the irrigation season commencing. (Transcript, pp. 107-111.)

During the contempt hearing, when this Court inquired of the Tribal Chairman how the Tribe could administer the decree if it was given over to them. His response was they could estimate the flow in the stream as good as the water commissioners. Such evidence is beyond being naive as to how the decree must be administered.

In addition, the Tribe has no authority to regulate the diversion of water according to the water rights of non-Indians residing off the reservation. This being the case, how can they possibly determine when the water rights of the reservation are in priority to rightfully be distributed to the Tribe?

It is clear that the tribe is not properly equipped nor sufficiently knowledgeable to administer the decree, particularly in contrast to the Court's water masters who have approximately 70 years of experience in administering the decreed water rights to 600 users.

This Court notes that the purpose of the adjudication and administration of the decree is to protect even the smallest water user in an important constitutionally protected water right. Some of those being protected are Indian farmers who own small farms on and off the reservation.

Of great significance at the contempt hearing was evidence produced by the Nevada Attorney General's office that shows in the past two years during the water seasons, this Court's water masters by various stay orders and interference by the Federal Court is that the tribe improperly used water and was even watering before the irrigation season. The irrigation season for the Upper Humboldt is from April 15 to August 15 of each year. The evidence at the hearing showed the Indians were irrigating

on April 11. (Transcript, p. 108.) Thus, every other water user on the Humboldt River has been improperly deprived of such waters and there has occurred irreparable damage to the other 600 users of the water.

FINDINGS OF FACT

1. The Tribe and Mr. McDade received proper service of this Court's Order to Show Cause.

2. On September 13, 1999, Wayne Testolin, the Supervising Water Commissioner for the Humboldt Decree, and two other commissioners went to the South Fork Reservation and intended specifically to regulate the Humboldt River pursuant to the Humboldt Decree.

3. Mr. Testolin traveled across the reservation to regulate water and to gain access to private properly commonly known as the Gund Ranch. Mr. Testolin's intention was to regulate turnouts from the Humboldt River that are located on the Gund Ranch and which serve private and tribal water rights.

4. Mr. McDade and a tribal police officer pursued Mr. Testolin and the water commissioners off the reservation and stopped them off the reservation on the Gund Ranch.

5. At this point a difference of opinion occurred between the Water Commissioners and Mr. McDade. Mr. McDade then ordered the Water Commissioners to get off the Gund Ranch, travel back onto the reservation, and go to the office of the tribal headquarters.

6. When Mr. McDade and the tribal police officer followed Mr. Testolin and the Water Commissioners onto the Gund Ranch, they intended to order Mr. Testolin and the Water Commissioners to return to the reservation.

7. Once on the reservation, Mr. McDade and the tribal police officer stopped the Water Commissioners, and Mr. McDade ordered the tribal police officer to handcuff and arrest Mr. Testolin. The tribal police officer handcuffed and arrested Mr. Testolin and placed him in a tribal police

car. Mr. Testolin was then driven off the reservation and released.

8. The proper administration of Humboldt River water rights is a complicated matter that requires, among other factors, daily access to all turnouts of the river so Water Commissioners can determine how much water is available in the Humboldt River.

9. For at least the past two years, the Tribe has frustrated the Water Commissioners' ability to gain access to headgates on its reservation and the Gund Ranch.

10. For at least the past two years, the Tribe has engaged in self-regulation of its Humboldt Decree water rights by regulating turnouts from the Humboldt River, without the permission of the Water Commissioners. The Tribe has regulated the river "as it sees fit."

11. The Tribe's self-regulation of the Humboldt River "as it sees fit" over at least the past two years has caused irreparable harm to downstream water right owners by depriving those water right owners of their full water right.

## CONCLUSIONS OF LAW

1. Mr. Testolin is an officer of the Sixth Judicial District Court of the State of Nevada, and whatever action is taken against him in his capacity as an officer of this Court is taken against this Court itself.

2. When Mr. Testolin traveled onto the Gund Ranch on September 13, 1999, he was acting in his capacity as an officer of this Court because he intended to regulate the Humboldt River pursuant to the Humboldt Decree.

3. When Mr. Testolin traveled onto the Gund Ranch on September 13, 1999, he was authorized by state law and the Humboldt Decree to regulate headgates that are located on that ranch.

4. When Mr. McDade and the tribal police officer ordered the Water Commissioners to leave the Gund Ranch, they acted in excess of the Tribe's authority.

5. When the Tribe and Mr. McDade arrested Mr. Testolin, it was as though they were arresting this Court and placing it in handcuffs.

6. The Tribe and Mr. McDade's arrest of Mr. Testolin constitutes contempt against this Court because Mr. Testolin is an officer of this Court, he was authorized by state law and the Humboldt Decree to regulate headgates on the Gund Ranch, and the Tribe and Mr. McDade's arrest of Mr. Testolin frustrated his ability to regulate the Humboldt River pursuant to the Humboldt Decree.

7. The Tribe and Mr. McDade's arrest of Mr. Testolin constitutes a serious and significant act of contempt because the arrest usurped this Court's authority and promotes violence and self-help.

8. The Tribe's claim that its arrest of Mr. Testolin was justified by the hot pursuit doctrine is not supported by the law because Mr. McDade and the tribal police officer did not follow the Water Commissioners onto the Gund Ranch with the intention of arresting them. Instead, Mr. McDade and the tribal police officer intended to order the Water Commissioners to return to the reservation.

9. The Tribe's self-regulation of its water rights constitutes contempt against this Court because self-regulation by any water user on the Humboldt River makes the proper administration of the Humboldt Decree unworkable, and self-regulation violates the provisions of the Humboldt Decree.

10. The Tribe's denial of Water Commissioner access to headgates that divert water from the Humboldt River constitutes contempt against this Court because such accessed is authorized under state law and the Humboldt Decree and the denial of such access totally disrupts the administration of the Humboldt Decree.

11. The Tribe's contemptuous actions have frustrated the administration of the Humboldt River,

thereby injuring every other user of water on the Humboldt River.

12. In its petition for an order to show cause, Petitioners properly prayed for injunctive relief from the Tribe and Mr. McDade's contemptuous conduct, and this Court's inherent power to enforce its own decrees includes the power to grant injunctive relief.

13. This Court must enter an injunction against the Tribe and Mr. McDade to coerce compliance with the Humboldt Decree. Insuring compliance with the Humboldt Decree is this Court's highest priority, and punishment for past violations of the decree is a secondary concern. Injunctive relief is the most appropriate tool to bring about compliance with the decree; imprisonment or a fine will not necessarily lead to that result.

14. By entering this order, this Court is not discriminating, nor is it intending to discriminate, against the Tribe or Mr. McDade. This Court is treating the Tribe and Mr. McDade as it would any other water user on the Humboldt River who frustrates administration of the Humboldt Decree.

Based upon the foregoing findings of fact and conclusions of law,

IT IS HEREBY ORDERED that this Court's August 20, 1998, Injunction against the Federal Court remains in full force and effect.

IT IS FURTHER ORDERED that the Defendants South Fork Bank of the Te-Moak Tribe of Western Shoshone Indians and Marvin McDade, in his capacity as Chairman of the South Fork Band Council, and their officers, agents, servants, employees and attorneys, successors in interest, and those persons in active concert with any of them, and each of them, who receive actual notice of this order by personal service or otherwise, are hereby enjoined from:

1. Frustrating the Water Commissioners' efforts to regulate the Humboldt River by denying the Water

Commissioners access to any headgates that divert water from the Humboldt River, and

2. Opening, closing, or otherwise regulating any diversionary structure that diverts water from the Humboldt River without the permission of this Court's Water Commissioners.

IT IS FURTHER ORDERED that Defendant Marvin McDade is hereby sentenced to three (3) days incarceration in county jail. This sentence is hereby suspending pending Mr. McDade's compliance with this injunction. Specifically, Mr. McDade is enjoined from frustrating the Water Commissioners' efforts to regulate the Humboldt River by denying the Water Commissioners access to any headgates that divert water from the Humboldt River.

IT IS FURTHER ORDERED that by resolution the Tribe will agree to provide a safe environment for the Water Commissioners and allow access to the tribal property by the Water Commissioners to carry out their duties under the Humboldt Decree. Failure to do so within 30 days from the date this order is served upon the Tribe will result in a directive of this Court to the Elko County Sheriff's Department to carry out protection of the Water Commissioners while on Tribal property.

IT IS FURTHER ORDERED that if the Tribe revokes its commitment to protect this Court's Water Commissioners and allow access to tribal property to fulfill their duties pursuant to the Humboldt Decree, or if the Tribe otherwise fails to comply with the provisions of this injunction of the Humboldt Decree, the Tribe will be required to post $10,000.00 with the Clerk of this Court. Said monies shall be used by the Court to do any or all of the following in order to bring compliance with the Humboldt Decree as the Court deems appropriate:

1. Pursuant to NRS 533.175, employ experts to determine the necessary methods, locking devices, headgates or other structures to bring compliance.

2. Pursuant to NRS 533.305, regulate the headgates and ditches on the reservation and if necessary cause to be constructed locking headgates, measuring devices or other necessary improvements to put into effect the provisions of the Humboldt Decree as it pertains to the tribal property.

3. Pursuant to NRS 533.470, employ guards to prevent unlawful diversions of water on the tribal property.

IT IS FURTHER ORDERED that the Tribe shall pay any cost incurred by the Water Commissioners that are above the costs that would normally be incurred for administration of the Humboldt Decree and which are necessitated by the Tribe's violation of this injunction.

IT IS FURTHER ORDERED that the Water Commissioners of this Court, in regulating the Humboldt River, will not treat the Tribe or Mr. McDade any differently than it would treat any other water right user on the Humboldt River system. The Water Commissioners shall ensure that the Tribe gets its fair share of water pursuant to the Humboldt Decree.

DATED this 26th day of October, 2000.

/s/ Richard A. Wagner

RICHARD A. WAGNER,

DISTRICT JUDGE

## APPENDIX L

SUPREME COURT OF THE STATE OF NEVADA

| | |
|---|---|
| SOUTH FORK BAND OF THE ) | No. 35591 |
| TE-MOAK TRIBE OF WESTERN ) | |
| SHOSHONE INDIANS OF ) | |
| NEVADA; MARVIN MCDADE, ) | |
| in his capacity as Chairman of ) | |
| the South Fork Band Council, ) | |
| Petitioners, ) | |
| vs. ) | |
| SIXTH JUDICIAL DISTRICT ) | |
| COURT OF THE STATE OF ) | |
| NEVADA, IN AND FOR THE ) | |
| COUNTY OF HUMBOLDT, ) | |
| AND THE HONORABLE ) | |
| RICHARD A. WAGNER, ) | |
| DISTRICT JUDGE, ) | |
| Respondents. ) | |
| and ) | |
| STATE ENGINEER of the State ) | |
| of Nevada and WATER ) | |
| COMMISSIONERS of the Sixth ) | |
| Judicial District Court, ) | |
| Real Parties In Interest. ) | |
| ) | |

**ANSWER TO EMERGENCY PETITION FOR WRIT OF PROHIBITION**

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COMES NOW, R. Michael Turnipseed, P.E., Nevada State Engineer, and the Water Commissioners of the Sixth Judicial District Court (hereinafter referred to jointly as the "State") and the Sixth Judicial District Court In and For the County of Humboldt (hereinafter referred to as "Respondent Court"), by and through the undersigned counsel, to file this answer to the South Fork Band of the Te-Moak Tribe of Western Shoshone Indians' (the "Tribe") emergency petition for a writ of prohibition.

## I. SUMMARY OF THE CASE

This case raises issues that are central to the State of Nevada's ability to control the distribution of water in the State. The Tribe owns water rights that were adjudicated by the Respondent Court before the Tribe purchased the water rights. The Water Commissioners, as officers of the Respondent Court, distributed these water rights before the Tribe acquired them. Officers of the Respondent Court distributed these waters on the Tribe's reservation for over fifty years after the Tribe purchased them. In 1998 the Tribe expressly prohibited officers of the Respondent Court from coming onto its reservation to distribute water rights. State law, and this Court's precedent, has long held that the interference with an officer of the court's ability to distribute water rights is contempt of court. Hence, the State initiated a contempt action against the Tribe in the Respondent Court. Despite over fifty years of compliance with the Respondent Court's jurisdiction over its water rights, and its benefit from the Respondent Court's orderly distribution of

the water rights, the Tribe now claims it is immune from the Respondent Court's jurisdiction. The Respondent Court denied that contention and scheduled a hearing to consider the contempt charges that had been lodged against the Tribe. The Tribe then filed this writ to challenge the Respondent Court's exercise of jurisdiction.

## II. FACTUAL BACKGROUND

The Humboldt River is located in northern Nevada and flows for over three hundred miles from the high mountains in and around Elko, Nevada, to the Humboldt Sink near Lovelock, Nevada. The Humboldt River is the primary water source for the agricultural and municipal communities that have developed along its banks.

* * *

Pages 2 through 6 Omitted

* * *

Water Commissioner's ability to regulate the Humboldt River. Appendix at 54. This petition initiated Humboldt III. On January 13, 2000, Respondent Court scheduled a hearing for January 26, 2000, to consider Humboldt III. The Tribe filed a motion for a restraining order in the federal court to restrain Respondent Court from considering Humboldt III. The federal court denied the motion, holding that "it does not appear that [the federal court has] jurisdiction of the claim now presented by the Band [Humboldt III]. Such jurisdiction remains in the state court." Appendix at 122-23.

On January 21, 2000, the Tribe and Mr. McDade filed a motion to dismiss the petition, arguing Respondent Court lacks jurisdiction, the Tribe has sovereign immunity, and the United States is a necessary and indispensable party to the action. Respondent Court held a hearing on January 26, 2000, considered Humboldt III, and denied the Tribe's motion to dismiss. The application for this writ followed.

## III. LEGAL BACKGROUND

There is no more important natural resource in Nevada than water. When settlers arrived in Nevada, their

survival depended upon the diversion of the scarce waters of Nevada's streams and rivers. Through such diversions, a law of custom arose among the settlers that recognized and respected the right a prior settler had to use water that had already been diverted to some beneficial use, and formed an alternative to the six-shooter. The settler's law of custom over water rights was incorporated into Nevada's law as the prior appropriation doctrine. *Walsh v. Wallace*, 26 Nev. 299, 327, 67 P. 914, 917 (1902). Pursuant to this doctrine, any person who intended to divert water from its natural flow for a beneficial use, and then actually diverted such water and applied it to a beneficial use, gained a right to use that amount of water. *Id.* That right of use was senior, *i.e.* superior, to water rights that were acquired through the application of water to beneficial use at a later date.

In recognition of the rights that had been acquired to Nevada's waters by settlers, in 1913 Nevada's Legislature adopted an adjudication procedure whereby a state courts could define the basis, measure, and limit of water rights that had been acquired through prior appropriation. *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914). At the same time, the Legislature established a statutory scheme for the acquisition of water rights which required all future appropriations of water to be made through an application filed with the State Engineer. Accordingly, the judicial adjudication process was designed to define all water rights that had been acquired through the non-statutory prior appropriation process, and the administrative process was designed to govern all future water rights. As detailed above, the water rights at issue in this case were established through the pre-statutory prior appropriation process and were adjudicated by the Respondent Court.

A. Water Right Adjudications Under Nevada Law.

The statutory procedure for adjudications of water rights includes an administrative, judicial, and enforcement phase. The state water code authorizes the State Engineer to

initiate the administrative phase of an adjudication of the water rights held in a stream system.[1] NRS 533.090. Thereafter, a judicial phase begins.[2] The Humboldt Decree was entered based upon this procedure. The judicial phase of an adjudication culminates in the entry of a judicial decree that affirms or modifies the State Engineer's order of determination. NRS 533.185. The judicial decree becomes the final decree of the water rights in the stream system and is conclusive upon all persons and rights lawfully embraced within the adjudication. NRS 533.210. After a final decree is entered, the enforcement phase of the adjudication begins.

B. Purpose of Water Right Adjudications.

Just as the diversion of water was essential to the survival of the original settlers in the West, the orderly distribution of water rights was essential to the economic development and survival of Nevada. The development of any economic enterprise depended upon the certainty that an enterprise could receive water without interruption. This concern is of particular concern in the Humboldt River valley. To foster certainty in water rights, the adjudication procedure was established to place the orderly distribution of water rights in state control.

In *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803

---

[1] Such an adjudication defines surface water rights that vested before 1905, the year in which Nevada first instituted a permit system for obtaining these rights. After the State Engineer initiates and completes the administrative phase of an adjudication, he enters an order of determination. NRS 533.160. That order is filed with the state district court that has jurisdiction over the geographic region where the stream system is located. NRS 533.165.

[2] The adjudication court's purpose is to determine where, how, and in what quantities, waters in a stream system were appropriated to beneficial use. The court then decrees a particular amount of water to each property for which proof existed of an appropriation for beneficial use. The basis, measure, and limit of the decreed quantity of water becomes what had been applied to beneficial use. NRS 533.035. The court's decree finally sanctions the right as appurtenant to a particular tract of land.

(1914), Justice Patrick McCarran reviewed the propriety of the adjudication law shortly after its enactment in a case arising out of the Humboldt River adjudication. In concurring in the ruling in that case, Justice McCarran agreed that:

> It is difficult to perceive how there may be any effective regulation or control over the water rights of a stream system like that of the Humboldt River and its tributaries, except through some form of state supervision. This river extends for a distance of about 300 miles, is in five counties and three judicial districts. . . . there are from 700 to 1,000 water users on the Humboldt River system. Undoubtedly other claimants are constantly applying for water rights on this system. The state at large is not only interested in protecting prior appropriators in their rights, but is interested in the conservation of the waters of the stream system to the end that the largest possible amount of land may be brought under cultivation through an economical diversion and use of such waters. To accomplish this beneficent object, the state has a right to exercise a superintending control over the entire river system. It is not to be assumed that so great and so important an undertaking cannot be fairly and intelligently administered. If so administered, it would seem that it ought to be particularly advantageous to prior appropriators. It is the history of irrigation in this and other states that the first appropriators of waters upon the natural streams are frequently forced into long, vexatious, and expensive litigation to protect their rights against subsequent appropriators. The case of *Bliss* v. *Grayson & Anderson* in the

> state courts, involving water rights on the Humboldt River, and *Miller & Lux* v. *Rickey, et al.*, in the federal court, involving water rights on the Walker River, are conspicuous examples, showing the need of some kind of intelligent state intervention.

*Id.* at 337-38.

The paramount interest of an adjudication is to define water rights, and establish an orderly distribution of those water rights through state control, so that vexatious litigation over the ownership and distribution of water rights is avoided. *See In re Manse Springs*, 60 Nev. 280, 108 P.2d 311 (1940) (adjudications undertake to ascertain water rights and set methods of control); *Carpenter*, 59 Nev. 42, 73 P.2d 1310 (1937) (adjudications are intended "to enable the state to supervise and administer the distribution of waters"). As stated in *Ormsby County*,

> It is manifest, both from the title and body of the act, that one of the main purposes of this law, and doubtless the principal purpose, was to place the distribution of the waters of the streams or stream systems of the state to the persons entitled thereto, *under state control.* The manner of such control is prescribed in sections 52 to 56, inclusive. It is not seriously urged, if we understand counsel correctly, that the state, within its police power, may not so regulate the distribution of the waters of the state. It is a matter, we think, clearly within the lawful exercise of such power. The public welfare is very greatly interested in the largest economical use of the waters of the state for agricultural, mining, power, and other purposes. While the police power cannot be made an excuse for the enactment of unreasonable, unjust, or oppressive laws, it may be legitimately exercised for the purpose of preserving, conserving, and improving the

> public health, safety, morals, and general welfare.

*Ormsby County*, 37 Nev. at 336-37, 142 P. at 811.

Also, as stated in *Hinckley v. Sixth Judicial District Court*, 53 Nev. 343, 352, 1 P.2d 105, 106 (1931):

> [T]he [adjudication] proceeding under the water law is a quasi public proceeding, wherein all claimants to the use of water of a stream system may have their claims adjudicated, to the end that the waters of the stream may be distributed under public supervision without needless waste or controversy. In other words, it was the intention of the legislature that the people who are entitled to the use of the waters of a stream system actually get it without needless waste or controversy. The statute must be interpreted in the light of that intention.

*Citing to Vineyard Land & Stock Co. v. District Court*, 42 Nev. 1, 171 P. 166 (1918).

C. Enforcement of Water Right Adjudications.

To effectuate the state control of a water source that has been adjudicated by a state court, Nevada law provides that the State Engineer and Water Commissioners distribute water under the supervision and control of the decree court. NRS 533.220. The State Engineer and his assistants, and the Water Commissioners and their assistants, are directed as officers of the court to distribute water pursuant to the decree, under the direct supervision of the decree court. *Id.* Such officers are considered officers of the decree court for the purpose of distributing water pursuant to the order of determination and the final decree. *Id.* These officers have the authority to enter upon and across land to enforce a final decree. NRS 533.305(3). These officers may assess fees against decreed water right owners to offset the cost of delivering decreed water. NRS 533.280-.295.

IV. SUMMARY OF ARGUMENT

This court has ruled on numerous occasions that any person who interferes in a Water Commissioner's duties in the administration of a state water right decree is in contempt of court. When the Respondent Court's Water Commissioners attempted to administer the Humboldt Decree on private

***

Pages 11 through 34 Omitted

***

RESPECTFULLY SUBMITTED this _____ day of March, 2000.

FRANKIE SUE DEL PAPA
Attorney General
By: /s/ Paul G. Taggart
PAUL G. TAGGART
Nevada State Bar #6136
Deputy Attorney General
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Attorneys for Respondents
and Real Parties in Interest

**APPENDIX M**

Case No. 2804-3

Dept. No. 1

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

IN THE MATTER OF THE DETERMINATION OF THE RELATIVE RIGHTS OF CLAIMANTS AND APPROPRIATORS OF THE WATERS OF HUMBOLDT RIVER STREAM SYSTEM AND TRIBUTARIES.

STATE ENGINEER of the State of Nevada, and WATER COMMISSIONERS of the Sixth Judicial District Court,

Petitioners,

vs.

SOUTH FORK BAND OF THE TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS OF NEVADA; MARVIN MCDADE, in his capacity as Chairman of the South Fork Band Council.

Respondents.

_____/

**ORDER**

The State Engineer of the State of Nevada ("State Engineer") and the Water Commissioners of the Sixth Judicial District Court ("Water Commissioners") (hereinafter referred to jointly as the "State"), in their capacities as officers of the Court, petitioned the Court to enter an Order to Show Cause why the South Fork Band of the Te-Moak Tribe of the Western Shoshone Indians (the "Tribe") and its Chairman, Marvin McDade, should not be

held in contempt for arresting a Water Commissioner and frustrating the enforcement of the Humboldt Decree. The Tribe and Mr. McDade filed a motion to dismiss the petition. Having considered the Tribe's motion to dismiss, and having held a hearing on the motion to dismiss, the Tribe's motion to dismiss **IS DENIED**.

* * *

Pages 2 through 7 Omitted

* * *

The Tribe and Mr. McDade cite to *Snooks v. Ninth Judicial District Court*, 112 Nev. 798, 919 P.2d 1064 (1996), claiming that its holding precludes this Court's exercise of jurisdiction over the Tribe and Mr. McDade. *Snooks* is distinguishable from the facts of this case. In *Snooks*, a non-Indian filed an original civil action against an Indian regarding an activity that occurred on Indian land. The Supreme Court held that the Tribe had not consented to suit and that the tribal court had retained exclusive jurisdiction over matters occurring on tribal land.

This action is not an original civil action. This action invokes the continuing jurisdiction of this Court. Also, the activity underlying this action did not occur on tribal land. The Tribe and Mr. McDade stopped the Water Commissioner on the Gund Ranch, non-Indian land. Further, as discussed below, the Tribe has consented to this suit, particularly by acquiring and using water rights that were encumbered by the obligation to comply with the Humboldt Decree. Finally, and most importantly, while the *Snooks* court reasoned that the tribal court had exclusive jurisdiction over the action before it, here this Court has exclusive jurisdiction over matters arising under the Humboldt Decree. *Alpine Land*, 174 F.2d at 1013-14. Accordingly, this Court has jurisdiction to consider this petition.

B. Sovereign Immunity.

The Tribe and Mr. McDade argue that the Tribe's sovereign immunity precludes this Court from finding that

they are in contempt. Tribal sovereign immunity can be waived by consent to suit. Further, tribal sovereign immunity can be waived by the United States. *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 173 (1977) (stating that sovereign immunity must be waived by the Tribe *or* the United States).

In this case, the United States purchased for the Tribe five ranches and their decreed water rights. Like any other contract, the United States and the Tribe could buy only what the sellers of those water rights had. The sellers of those water rights had decreed water rights that were burdened by the obligations of the Humboldt Decree. In fact, the deeds for the five ranches mentioned each ranch's appurtenant water rights, or the Humboldt Decree. The Tribe received water rights that were burdened by the obligations of the decree. By voluntarily purchasing these water rights, the United States and the Tribe chose to put themselves in a position where they are subject to the Decree, thereby waiving any immunity from a suit in this Court. *See United States v. McClendon*, 885 F.2d 627, 630 n.1 (9th Cir. 1989) (holding that by taking an action on a tribe's behalf, the United States can waive a tribe's immunity from suit); *Native Village of Eyak v. G.C. Contractors*, 658 P.2d 756, 761 (Alaska 1983) (ruling that by entering agreement that included right of state court review, tribe waived its immunity). Accordingly, the Tribe's sovereign immunity does not preclude this action. "To hold at this stage that tribal immunity blocks modification of an equitable decree would impermissibly violate a central tenet of equity jurisprudence, that of flexible decrees." *United States v. Oregon*, 657 F.2d 1009, 1015 (9th Cir. 1981). The Tribe's conduct over the last fifty-five years is ratification of this waiver. The Tribe has accepted the benefits of the Humboldt Decree, allowed Water Commissioners to travel on and across the reservation, and has paid assessment fees for that service.

Further, this case does not involve Indian reserved water rights, it involves state water rights that were

purchased for the Tribe. All state water rights are subject to state regulation. To hold that the Tribe has sovereign immunity in this case would completely frustrate the entire Humboldt Decree. All water users must be subject to the Humboldt Decree's restrictions and obligations. It is impossible to administer the decree if water owners believe they can administer the decree themselves. The action of every water user on the river affects every other water user on the system, potentially causing irreparable harm. Accordingly, the notion that any person can acquire or use property subject to the decree and then declare they are not subject to the decree will defeat the purpose of the decree.

Congress understood this when it enacted the McCarran Amendment. 43 U.S.C. § 666 (1994). In that amendment, Congress waived the immunity of the United States, and any person claiming an ownership through the United States, because the assertion of such immunity completely defeats important, long-established water administration procedures. *Arizona v San Carlos Apache*, 463 U.S. 545 (1983) (holding that Indian water rights are subject to state court adjudications). Specifically, Congress stated that:

> [i]t is apparent that if any water user claiming to hold [a water] right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water from the beneficial use by the other water users

* * *

Pages 10 through 14 Omitted

* * *

III. CONCLUSION

For the reasons stated herein, the Tribe's motion to dismiss is denied.

DATED this 2nd day of February, 2000.

/s/ Richard A. Wagner

DISTRICT JUDGE

## APPENDIX N

* FILE NO. 80350

ARCHIE J. DEWAR, ET UX TO UNITED STATES OF AMERICA, in Trust for the TE-MOAK BANDS OF WESTERN SHOSHONE INDIANS

WARRANTY DEED

THIS INDENTURE, made and executed as of the 9th day of May, 1942, by and between ARCHIE J. DEWAR, and JESSIE HYLTON DEWAR, his wife, of the County of Elko, State of Nevada, parties of the first part, and the UNITED STATES OF AMERICA, in trust for the Te-Moak Bands of Western Shoshone Indians of Nevada, party of the second part.

WITNESSETH:

That the said parties of the first part, for and in consideration of the sum of FORTY THREE THOUSAND FOUR HUNDRED EIGHTY-SEVEN AND NO ONE HUNDREDTHS ($43,487.00) DOLLARS, lawful money of the United States of America, to them in hand paid by the said second party, the receipt whereof is hereby acknowledged, and other good and valuable consideration, do by these presents, grant, bargain, sell, convey and confirm unto the said party of the second part, in trust , as aforesaid, all those certain lots, pieces and parcels of land situate, lying and being in the County of Elko, State of Nevada, and particularly bounded and described as follows:

* * *

[Legal Description Omitted]

* * *

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, the remainder and remainders, reversion and reversions, rents, issues and profits thereof.

Together with all waters, water rights, rights to the use of water, dams, ditches, canals, pipes, pipe lines and any and all other means and appliances for the diversion and/or use of water appurtenant to or used or enjoyed in connection with the above described land or any part thereof, and including all water rights acquired by appropriation and use, and/or by applications to or permits from the State Engineer of the State of Nevada, and/or all rights decree to the first parties or either of them, or to their predecessors in interest, as appurtenant to said lands or any part thereof, in the final decree of the Sixth Judicial District Court of the State of Nevada, in and for the County of Humboldt, in the matter of the determination of the relative rights of claimants and appropriators of the waters of the Humboldt River Stream system and its tributaries, being No. 2408 in the files of said Court.

Together with all grazing rights and privileges and all stockwatering rights appurtenant to or used or enjoyed in connection with, or growing out of the use of the above described land, or any part thereof.

TO HAVE AND TO HOLD, all and singular, the above mentioned and described premises, together with the appurtenances, and the said water rights, range rights and grazing privileges unto the said party of the second part, and to its successors in said trust forever.

And the said parties of the first part, and each of them, for themselves and their and each of their heirs, executors and administrators, in the quiet and peaceable possession of the said party of the second part, in trust, as aforesaid, and its successors in said trust, against the said parties of the first part, their and each of their heirs, executors and administrators, and against all persons whomsoever lawfully claiming or to claim the same, shall and will warrant, and by these presents ever defend; provided however, that said warranty does not and shall not apply to conveyance of water rights, stockwatering rights or grazing privileges, or mineral rights.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their respective hands the day and year first hereinabove written.

ARCHIE J. DEWAR

JESSIE HYLTON DEWAR

STATE OF NEVADA,)

) SS.

COUNTY OF ELKO. )

On this 9th day of May, 1942, personally appeared before me, a Notary Public in and for said County and State, ARCHIE J. DEWAR and JESSIE HYLTON DEWAR, his wife, known to me to be the persons described in and who executed the same freely and voluntarily and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal the day and year in this certificate last above written.

SEAL

HAYDEN HENDERSON

Notary Public.

My Commission expires Dec. 19, 1944

$35.20 Internal Revenue Stamps attached and cancelled A.J.D.

5/9/42

Filed for record at request of Milton B. Badt on the 3 day of Mar. 1943 at 3:00 o'clock P.M.

Gertrude M. Williams,
County Recorder

## APPENDIX O

UNITED STATES GOVERNMENT

memorandum

DATE: April 14, 1998

REPLY TO

ATTN OF: Phoenix Area Director

SUBJECT: South Fork Band Council Tribal Resolution No. 98-SF-12 (South Fork Water Rights)

TO: Superintendent, Eastern Nevada Agency

Thank you for providing this office with a copy of the above-referenced Tribal resolution (copy attached) wherein the South Fork Band Council has requested that the Bureau of Indian Affairs (BIA), Superintendent, Eastern Nevada Agency:

(1) notify the State of Nevada Water Commissioner and their representatives that they are not to be allowed to regulate any of the upstream turnouts that supply the South Fork Reservation with irrigation water; and

(2) not pay for water with any monies that might be allocated to South Fork Band for its use.

I appreciate the opportunity to address the issues raised by the Band in its Tribal resolution and to provide guidance to you regarding the BIA's position on the nature and character of the water rights associated with the South Fork Reservation. This memorandum contains certain factual information regarding the South Fork Reservation of which you are well aware, but which is included to place my guidance into context.

Genesis of the South Fork Reservation

The South Fork Reservation was established by Secretarial proclamation dated February 8, 1941. Presently, the reservation comprises approximately 13,049.52 acres

acquired for the benefit of the Te-Moak Bands of Western Shoshone Indians. The core lands of the South Fork Reservation are four adjoining ranches and four other individual parcels acquired under the authority of the Indian Reorganization Act of 1934 between 1938 and 1951. These lands are located along the mainstem of the South Fork Humboldt River and its tributaries. These lands contain some of the best watered lands in the whole region around Elko, with some water rights priorities dating from 1867, and include Taylor Grazing Act and U.S. Forest Service grazing rights.

Water Rights of the South Fork Reservation

Most of the lands acquired for the reservation are irrigated from the South Fork Humboldt River and have decreed water rights resulting from a State of Nevada adjudication of the Humboldt River system and a decree (the Edwards Decree) entered in 1935, prior to the purchase of the ranches for the South Fork Reservation. In 1975, the Bureau of Indian Affairs, Phoenix Area Office, completed a report titled "Natural Resource Study with Emphasis on Water" for the South Fork Indian Reservation and Odgers Ranch. This report contains a profile of the water rights associated with the South Fork Indian Reservation. The report indicates that with regard to the four ranches acquired for the reservation, total water duties for the Reservation's state decreed water rights include 9,138.13 acre-feet having priorities between the years 1867-1916. I refer you to this report for further details concerning the water rights associated with the South Fork Reservation lands.

It is unusual for Indian reservation lands to have state decreed water rights that are senior to the establishment of the reservation. The more usual situation is for Indian reservations to be established prior to any significant water use and subsequent appropriation under state law by non-Indians, so that the Indian water rights are senior in priority to those water rights non-Indians may have under state law. Indian reserved water rights are commonly referred to as "Winters rights," named after the U.S. Supreme Court case,

*Winters v. United States*, which established the Indian reserved water rights doctrine. The characteristics of the Indian reserved water rights are described as follows:

It is generally understood that the establishment of an Indian reservation by the United States includes an implied reservation of water rights in sources of water within or bordering the reservation. The Indian reserved water rights are reserved as of the date of the establishment of the reservation; competing water users with prior appropriation dates under state law take precedence over the Indian reserved rights, but those with later dates are subordinate; the quantity of water reserved for Indian use is that amount sufficient to irrigate all the practicably irrigable acreage of the reservation; and Indian reserved water rights are not lost by non-use. Although the Indian reserved water rights doctrine preserves the senior priority of water rights that might be appurtenant to Indian reservation lands, such water rights remain undefined and hard to enforce until they are quantified by an appropriate court, and a decree for the water rights issued. In 1976, the U.S. Supreme Court upheld the validity of state court adjudications of Indian reserved water rights (*see Colorado River Conservation District v. United States*).

The South Fork Reservation lands are located in the South Fork Humboldt River basin, and water rights in the South Fork Humboldt River were fully adjudicated by the State of Nevada prior to the time the South Fork Reservation lands were purchased by the United States and designated as an Indian reservation. The United States acquired the state decreed water rights appurtenant to the lands when the lands were purchased for the South Fork Band. As such, the water rights appurtenant to the South Fork Reservation, although state decreed water rights in nature, are superior and senior to any Indian reserved water rights that might be implied due to the establishment of the South Fork Reservation by the United States.

It is not clear from the 1975 report whether the State of Nevada's 1935 adjudication of the Humboldt River system

resulted in fully appropriating all waters in the South Fork Humboldt River. To the extent this did not occur, and to the extent it is determined that the South Fork Reservation is in need of water beyond its state decreed water rights, it may be possible to claim and appropriate additional water rights for the Reservation under the Indian reserved water rights doctrine, with a priority date based on the date the Band's Reservation was established.

Authority of the State of Nevada to Administer Water Rights Appurtenant to Reservation Lands

The State of Nevada administers water rights decreed under the Edwards Decree of 1935. As with the administration of water rights under any court decree, the Edwards Decree sets out a complex arrangement for use of water on all the lands, Indian or non-Indian, covered by the Decree. Water rights are assigned to three classes of lands: Harvest Crops (Class A), Meadow Pasture (Class B), and Diversified Pasture (Class C). The terms of the Decree set forth irrigation seasons, water duties, and priorities for use among the decreed water rights holders in the South Fork Humboldt River. It is the responsibility of the State of Nevada to assure that the Decree is administered lawfully and efficiently on all lands covered by the Decree, including the state decreed water rights on the lands of the South Fork Reservation.

Allocation of BIA Monies to South Fork Band for Irrigation Expenses

Please be advised that for fiscal year 1998, I do not anticipate the allocation of any BIA monies to the South Fork Band for irrigation related expenditures. As such, any costs associated with operation and maintenance of the Band's irrigation delivery system, including costs associated with administration of the Edwards Decree that may be assessed by the State of Nevada, are the responsibility of the Band and its water users.

Conclusion

Based on the foregoing, it would be inappropriate for the

BIA to notify the State of Nevada that it may be allowed to regulate the turnouts that supply the South Fork Reservation with irrigation water. To the extent the Band believes that the State of Nevada is administering the Band's state decreed water rights in violation of the Edwards Decree, it would be appropriate for the BIA to research and examine the matter in that context, and to assist the Band to assure, vis-a-vis other water rights holders under the Edwards Decree, that the State of Nevada is lawfully administering the Band's water rights.

If I can be of further assistance in this matter, please let me know.

Attachment

[Signature unreadable]

United States Government

MEMORANDUM

Date: April 15, 1998

Reply to

Attn of: Superintendent, Eastern Nevada Agency

Subject: South Fork Resolution 98-SF-19

To: Phoenix Area Director

Attached is the above cited resolution. It requests yourself, the solicitors office and water resources staff to meet with them.

In fact this resolution beat me back to the office. This morning the South Fork Band Council held a meeting with the State of Nevada and myself, (contrary to the 3rd Whereas, I did not call the meeting) concerning the water master fees or water assessment or the South Fork Reservation.

Mr. Mike Turnupseed explained the water adjudication process and how the water master operates and the current assessment rate, which is $00.23. This pays for the

operation of the Elko office. I than read the letter from your office on the establishment of the reservation and how the purchase included the water rights, to include the winters doctrine. Mr. McDade than advised Mr. Turnupseed that he would not pay any water fees. Mr. Turnupseed stated he would contact the State Attorney Generals Office and initiate action against South Fork. Mr. McDade said go ahead. He further stated that "we are now fighting everybody: Bureau of Land Management, Fish and Wildlife Service, the Forest Service, the State of Nevada and we will fight the Bureau of Indian Affairs also."

Mr. McDade refuses to accept the explanation that their water rights are senior to almost everybody else on the system, fourth overall. He insists that they had a winters doctrine right and do not have to pay for any water usage. He stated that if the states locks the gates he will cut off the locks. The resolution is in error it is not being elevated, it has been elevated to confrontational level.

I have since been advised that the tribal water users that want to pay the water assessment fees are initiating a suit against the South Fork Band Council in tribal court, suing for specific performance.

This is going to be a situation were the bureau is going to have to protect the tribe from itself.

/s/Steve Tibbetts

CORRECTED COPY

(4)

FEB 6 2001

No. 00-838

In The

# Supreme Court of the United States

SOUTH FORK BAND OF THE TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS OF NEVADA; MARVIN MCDADE, in his capacity as Chairman of the South Fork Band Council,

*Petitioners,*

v.

SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT, AND THE HONORABLE RICHARD A. WAGNER, DISTRICT JUDGE,

*Respondents.*

and

STATE ENGINEER of the State of Nevada and WATER COMMISSIONERS of the Sixth Judicial District Court,

*Real Parties In Interest.*

**On Petition For Writ Of Certiorari To The Nevada Supreme Court**

## PETITIONERS' REPLY BRIEF

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## ARGUMENT

### I. STATE APPELLATE COURT DENIALS OF APPLICATIONS FOR WRITS OF PROHIBITION ARE FINAL FOR PURPOSES OF REVIEW BY THE UNITED STATES SUPREME COURT.

The Tribe[1] seeks this Court's review of the Nevada Supreme Court's denial of its application for a Writ of Prohibition seeking to enjoin the lower state court from proceeding in excess of its jurisdiction asserting the Tribe's federal common law immunity from suit. The Respondents argue that the decision of the Nevada Supreme Court is a "preliminary decision" and should not be reviewed by this Court. (Opp. p., 9). This Court has jurisdiction over final decisions of a state court pursuant to 28 U.S.C. § 1257. Denials of writs of prohibition are final and reviewable even though the underlying litigation continues when the denial is conclusive on the issue put forward in the writ. As noted by a distinguished commentator on Supreme Court practice,

> The principles heretofore discussed apply with equal force to civil proceedings in prohibition, mandamus, *quo warranto*, and for writ of error *coram nobis*. Applications for such writs are often filed in state courts as independent cases, even though they relate to a pending lawsuit. Such proceedings may be carried forward to conclusion before the primary litigation has come to an end. To be final for purposes of

---

[1] "Tribe" refers to the Petitioners, the South Fork Band of the Te-Moak Tribe of the Western Shoshone Indians, *see* Petition p. 1.

> § 1257, the state court judgment must conclusively determine the right of the applicant to the writ sought. . . . Instances where the Court has accepted § 1257 jurisdiction over state court judgments finally disposing of applications for writs of prohibition include *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Madruga v. Superior Court*, 346 U.S. 556, 557 n.1 (1954); *Rescue Army v. Municipal Court*, 331 U.S. 549, 565-68 (1947); *Bandini Co. v. Superior Court*, 284 U.S. 8, 14-15 (1931)[2]

Moreover, this Court has accepted review when state courts have decided federal issues conclusively, *see Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In this case the Respondents concede that, "The Nevada Supreme Court may have ruled on an important federal issue, i.e. tribal sovereign immunity, . . . " (Opp. p. 9). That it ruled conclusively on the important federal issue of tribal sovereign immunity is clear.

In this case, the lower state court conducted a contempt proceeding against the Respondent after the Writ of Prohibition was denied. A decision was rendered by the lower court finding the Tribe and its Chairman in contempt and imposed prospective penalties for any future contemptuous conduct. The Tribe has appealed that decision to the Nevada Supreme Court on issues unrelated to the issue of the sovereign immunity of the Tribe. Even if the Tribe were successful on appealing the merits of the contempt claims and the appropriateness of the penalties prospectively imposed, the issue of whether

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[2] Supreme Court Practice, 7 Ed., Robert L. Stern [*et al.*], The Bureau of National Affairs, Inc. (1993), p. 108.

or not the Tribe is immune from suit in the first instance would not be resolved. If this Court denied Certiorari at this time and if the Tribe was unsuccessful on the merits, then the Tribe would once again have to file a Writ with this Court. Such a process is not judicially economical. Consequently, the decision of the Nevada Supreme Court on the federal common law question of tribal sovereign immunity is a final judgment and is reviewable by this Court at this time.

This Court has previously enunciated its role as final arbiter of federal Indian law issues even in water rights adjudication cases, *see Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 103 S.Ct. 3201 (1983). Even though in that case, this Court ruled that state water right adjudication cases could be heard in state court against the United States, this Court still recognized the importance of Tribal sovereign immunity by stating,

> Nothing we say today should be understood to represent even the slightest retreat from the general proposition we expressed so recently in *New Mexico v. Mescalero Apache Tribe*, 462 U.S., at 332: 'Because of their sovereign status, [Indian] tries and their reservation lands are insulated in some respects by a 'historic immunity from state and local control,' *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973), and tribes retain any aspect of their historical sovereignty not 'inconsistent with the overriding interests of the National Government.' *Washington v. Confederated Tribes*, 447 U.S. 134, 153 (1980).
>
> 463 U.S. 545, 570-571.

This Court announced its intention to review state court decisions involving allegations for failure to follow federal law when it stated,

> We also emphasize, as we did in *Colorado River*, that our decision in no way changes the substantive law by which Indian rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment. (Emphasis in the original).

463 U.S. 545, 571.

## II. THE TRIBE DID NOT EXECUTE DEEDS CONSENTING TO STATE COURT JURISDICTION.

The gravamen of the Tribe's argument is that a tribe's waiver of immunity from suit must be unequivocally expressed and cannot be waived by implication. The Respondent argues for the first time that not only does the United States' acquisition of state created water rights acts as such a waiver but that the Tribe itself executed deeds thereby acquiescing to state court jurisdiction. (Opp. pp. 16-19). In support of that argument, the Respondent asserts that,

> As evidenced by the deeds of conveyance, the United States and the Tribe expressly, intentionally and voluntarily acquired land water

> rights, and encumbrances, one being the respondent court's jurisdiction.
>
> (Opp. p. 16).

And that,

> The United's and the Tribe's execution of these deeds divested the Tribe's immunity . . .
>
> (Opp. p. 17)

The Respondent's assertion that the Tribe executed deeds encumbered by state water law is without support in the record. The deeds in questions were executed only by the United States through various purchases of private ranches from May 1937 through November 1938. (Writ, p. 3). The Respondents cannot point to the existence of a deed executed by the Tribe. Indeed, the Tribe itself did not exist as an entity until 1941[3]. It is inconceivable that a Tribe could be found to have expressly waived its immunity from suit by purchases of land by the United States before it even existed as a formal tribal entity.

Assuming for the purposes of argument that the Tribe executed the deeds, the Respondents assertion that the Tribe thereby expressly granted an easement across the reservation by executing deeds burdened with the

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[3] The peoples that are members of the Tribe are descended from indigenous peoples who ultimately were identified as the Te-Moak Tribe of Western Shoshone Indians. That Tribe was federally recognized in August 24, 1938. Individuals relocated to the lands purchased by the United States when a reservation was created from those lands in 1941. From then on, those peoples who resided on that reservation, were identified as members of the South Fork Band of the Te-Moak Tribe of Western Shoshone Indians.

obligations of the Humboldt Decree (Opp. p. 25) is untenable. This argument is inconsistent with Respondents assertion that the Humboldt Decree does not specifically burden the property owner with easement across their property but rather that it is, "**implicit** in this injunction as a necessary power water commissioners have to travel . . . " (Emphasis added). (Opp. p. 26). Essentially, the Respondents argument is that the Tribe has explicitly granted an easement by executing deeds, which they have not, that are burdened only with an implicit right to travel. Essentially, the Respondents urge an express waiver upon an implication based upon an implication.

## III. THE WRIT SHOULD BE GRANTED BECAUSE THE ISSUES PRESENT ARE LIKELY TO RECUR.

Respondents urge that the Writ should be denied because the United States has admitted the factual situation would not be "oft repeated" (Opp. p. 10)[4]. In the

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[4] The proceeding before the Nevada Supreme Court was a pure legal challenge to the lower court's assertion of jurisdiction over an Indian tribe when its immunity from suit had not been waived. At the time of the filing of the Writ of Prohibition, no factual hearing had taken place before the lower court. Even though the Respondents complain that the Petitioner made, "a number of factual assertions that were not litigated in the lower court . . . " (Opp. p. ) the Respondents' brief is replete with factual allegations that were not litigated as part of this appeal. (Opp. pp. 5-7). Moreover, some of these assertions are contradicted. The Respondents assert that for three full irrigation seasons, the Tribe prohibited the state from regulating its water rights (Opp. p. 30) yet the Respondents note that they obtained a preliminary injunction in September 1999 prohibiting the Tribe from barring access to head gates on the

United States' Petition for Writ Of Certiorari in *Department of Interior v. South Dakota*, 519 U.S. 919, 117 S.Ct. 286, 136 L.Ed.2d 205 (1996), the Solicitor General of the United States brought to the Court's attention the significant amount of land being put in trust for Indian tribes. The Solicitor stated in his brief,

> The decision below has great practical significance to the Secretary's day-to-day administration of the IRA. We have been informed by the Department of the Interior that there are 439 pending applications to the Secretary to take land in trust. The court of appeals' ruling calls into question the Secretary's authority to do so.

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reservation (Opp. p. 5), which the tribe has complied with by enacting a resolution authorizing access onto the reservation. The Respondents note that the lower court held a contempt hearing (Opp. p. 7) but do not inform this Court that the Tribe in open court and by subsequent resolution authorized access across the reservation pending this appeal.

Respondents assert that part of the Tribe's water rights is served by diversions located on the Gund Ranch which can only be reached via a road crossing the reservation. (Opp. p. 5). Yet, Respondents admit that they flew over the reservation. (Opp. p. 6).

The Respondents describe Humboldt II as the Respondents effort to compel the United States to pay the Tribe's water assessment fees (Opp. p. 4) but do not inform this Court that the United States has paid the fees that were the subject of Humboldt II.

> In addition, the decision below calls into question thousands of acquisitions (covering an estimated 9 million acres) that the Secretary has made under Section 5 during the past 60 years. Challenges to such acquisitions might be raised in a broad range of cases in which the trust status of land may be relevant, including those concerning state and tribal taxation, land-use regulations, and law enforcement jurisdiction. See, *e.g.*, *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992) (state taxation of non-trust lands); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (zoning of non-Indian lands); 18 U.S.C. 1151 *et seq.* (federal prosecution of offenses occurring in "Indian country"). (Footnote omitted).
>
> App. at A-2.

The United States highlights many situations wherein the applicability of state laws and state court jurisdiction on lands purchased by the United States for Indian tribes is called into question. While not all of the 9 million acres referred to involve water law matters, it is conceivable that a sizeable percentage of these lands hold appurtenant water rights and the questions of state court jurisdiction could, therefore, arise elsewhere.

## CONCLUSION

For the reasons set forth in Petitioners' Brief, the Tribe requests that its Petition for a Writ of Certiorari be granted.

Respectfully Submitted

RAYMOND RODRIGUEZ, ESQ.
*Council for Petitioners*

# APPENDIX A

App. 1

No.

**In The Supreme Court of the United States**
OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
PETITIONERS

*v.*

STATE OF SOUTH DAKOTA AND CITY OF OACOMA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

# PETITION FOR A WRIT OF CERTIORARI


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* * *

The decision below has great practical significance to the Secretary's day-to-day administration of the I.R.A. We have been informed by the Department of the Interior that there are 439 pending applications to the Secretary to take land in trust. The court of appeals' ruling calls into question the Secretary's authority to do so. In addition, the decision below calls into question thousands of acquisitions (covering an estimated 9 million acres) that the Secretary has made under Section 5 during the past 60 years. Challenges to such acquisitions might be raised in a broad range of cases in which the trust status of land may be relevant, including those concerning state and tribal taxation, land-use regulation, and law enforcement jurisdiction. See, *e.g.*, *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992) (state taxation of non-trust lands); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (zoning of non-Indian lands); 18 U.S.C. 1151 *et seq.* (federal prosecution of offenses occurring in "Indian country").[7]

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[7] We do not concede, of course, that collateral attacks on the United States' trust title to land should be entertained in the sorts of cases cited in the text, but the prospect of the numerous attempts to do so exacerbates the uncertainty occasioned by the court of appeals' constitutional ruling.